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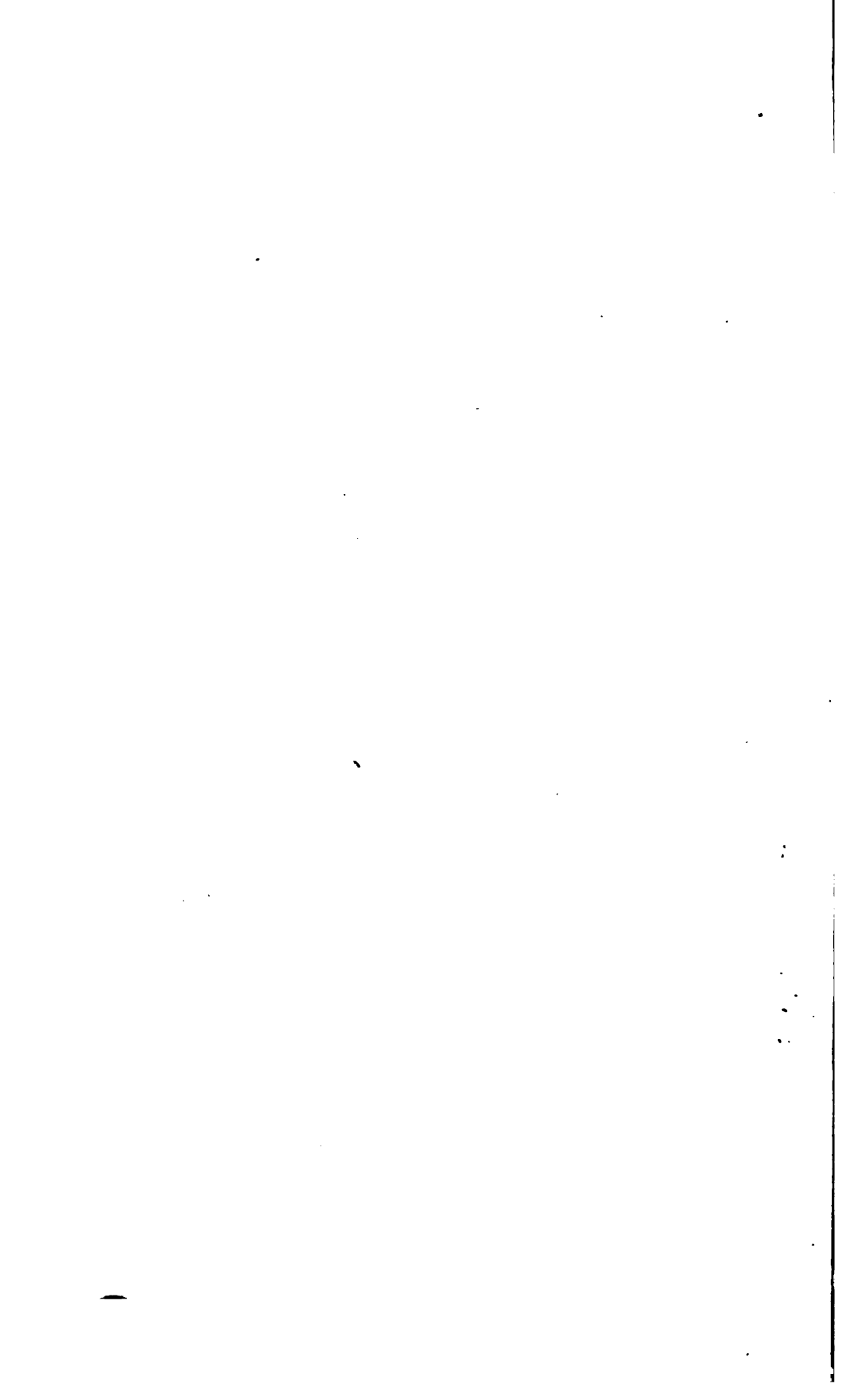


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A

DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

By **WILLIAM CRUISE, Esq.**
BARRISTER AT LAW.

THE FOURTH EDITION,
REVISED AND CONSIDERABLY ENLARGED,
By **HENRY HOPLEY WHITE, Esq.**
BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

IN SEVEN VOLUMES.
VOLUME I.

CONTAINING
A PRELIMINARY DISSERTATION ON TENURES.

- | | |
|-----------------------------------|---------------------------------------|
| Title 1. ESTATE IN FEE SIMPLE. | Title 7. JOINTURE. |
| 2. ESTATE IN TAIL. | 8. ESTATE FOR YEARS. |
| 3. ESTATE FOR LIFE. | 9. ESTATE AT WILL, AND AT SUFFERANCE. |
| 4. ESTATE TAIL AFTER POSSIBILITY. | 10. COPYHOLD. |
| 5. CURTESY. | 11. USE. |
| 6. DOWER. | 12. TRUST. |
-

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THE
EDITOR'S PREFACE.

It is now thirty years since Mr. Cruise's Digest of the Law of Real Property was first published. During that time it has gone through three large editions; and a fourth being required, is such unequivocal proof of merit, that it would be impertinent, in this place, to attempt any commendation of a work, already so strongly impressed with the stamp of public approbation.

In preparing the present, the Editor has carefully endeavoured to preserve the integrity of the text of the third edition; and, in almost every instance, the corrections, alterations, and additions will be found within brackets. He has corrected whatever errors were discovered, either in the statements of the cases cited by Mr. Cruise, or in his conclusions; and has added the leading authorities reported since the publication of the third edition.

The several statutes, lately effecting important and extensive changes in the law of real property, very much increased the anxiety and responsibility of the

laborious task undertaken by the Editor; and, in the execution of that portion of his duty more particularly, he feels some claim must be made upon the indulgence of the profession. He cannot be so sanguine in the success of his efforts, as to suppose there are not many instances, in which the bearings of these statutes upon the old law, have escaped his attention. Indeed, many years must elapse before all the consequences of the changes can be known.

Nearly 1100 cases, either stated or referred to, have been added in the present edition, and these are distinguished in the Index of Cases by an asterisk.

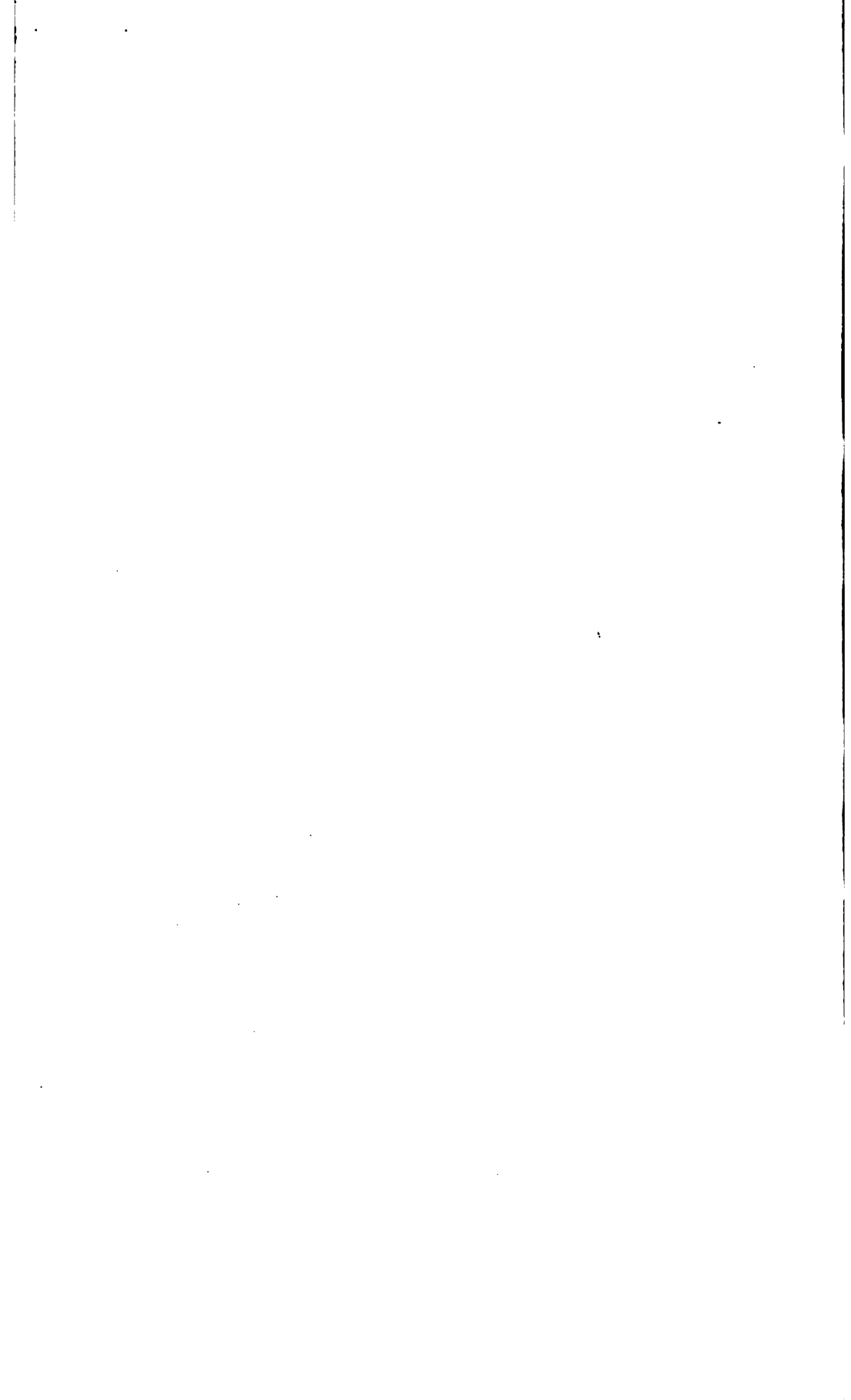
The Editor is responsible for Chapter XVI. on Powers of Sale and Exchange, under the title *DEED*, Vol. IV.; and for the additional Chapter on *MERGER*, Vol. VI. For the insertion of the latter, an apology is not deemed necessary, the subject being important, and but incidentally noticed by Mr. Cruise. The Editor most fully acknowledges his obligations to the valuable labours of Mr. Preston, in his third volume of *Conveyancing*: but thinking the subject of *Merger* not exhausted, and that a short treatise upon it would be acceptable, he ventured to insert the Chapter under *Tit. XXXIX.*

The Acts relating to real property, passed in the last session of Parliament, and subsequently to the printing of the fifth volume, have been inserted or abridged in an Appendix, Vol. VII.; and through this medium, the Editor has offered some observations upon a few

points, that have occurred in practice, principally respecting the construction of the English Act for abolishing fines and recoveries.

Until the second volume was nearly printed, he was not aware of the inaccuracies in the references to cases, in the margin of the last edition: when, therefore, such inaccuracies in the two first volumes are not mentioned among the Errata, the reader will find the names and references accurately inserted in the General Index of Cases, Vol. VII. The references to the cases in the four succeeding volumes have been examined and corrected; and, through the kindness of friends, the Editor has collated several copies of the former editions.

*Lincoln's Inn,
November, 1834.*



ADVERTISEMENT

TO

THE THIRD EDITION.

THE favourable reception which this Work has met with from the Profession, induced the Author to add to the Second Edition, a Preliminary Dissertation on Tenures; together with a Chapter on the Statute of Frauds; and also to use his utmost endeavours, by a careful revision and correction of the whole, and by the addition of many new cases, to render it more complete.

The Third Edition has been carefully revised and improved by the addition of several cases and references.



PREFACE

TO

THE FIRST EDITION.

ALTHOUGH the Law of Real Property forms the most extensive and abstruse branch of our jurisprudence, yet no attempt has hitherto been made to reduce it to a distinct and comprehensive system. A Digest of this part of the Law is therefore here offered to the Profession; in which a systematic distribution is framed of the general principles of each Title; supported by abridgments of the cases, in which those principles have been established, or confirmed.

It is but of late years that this mode of treating legal subjects has been adopted. Our abridgments and treatises on particular Titles of the law formerly contained little more than a collection of the adjudged cases, that had been determined on each Title; dis-

posed without much method, and without establishing or deducing any general principles.

There was, however, one eminent exception ; the excellent Essay on Contingent Remainders by the late Mr. Fearn. The perusal of that admirable work first suggested to the Author the idea of attempting to form a methodical arrangement of the general principles of the Law of Real Property. And upwards of twenty years since, he submitted to the Profession his Essay on Fines, written avowedly on that plan.

The favourable reception with which the Profession honoured that attempt, encouraged him to proceed in discussing all the other Titles belonging to this part of the Law in the same manner. In the prosecution of this Work he became every day more sensible, that the true mode of treating legal subjects, as well as other branches of science, is by a systematic distribution of abstract principles, illustrated and supported by adjudged cases. In this idea he was fully confirmed by the authority of the late Sir William Jones ; who has truly said, “ If law be a science, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason. But if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened ; and he will become the

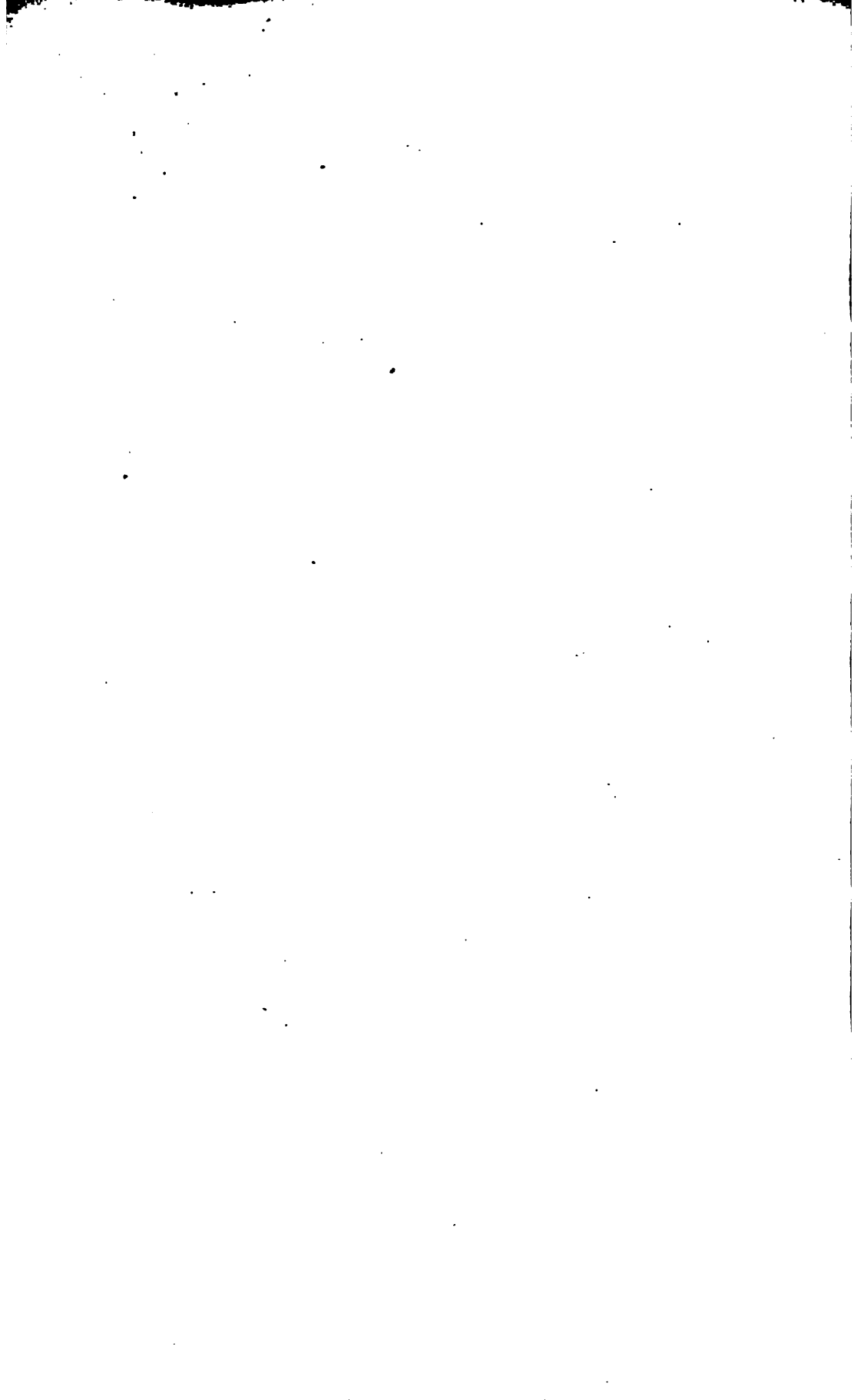
greatest lawyer who has the strongest habitual or artificial memory." (a)

Although the portion of time which the Author has been able to spare from the avocations of his profession has, for several years, been employed in the execution of this Work, yet he is conscious that many omissions, and, he fears, errors, may be discovered in it. But such must be the case in every attempt of this nature. Those, who are most conversant in our law, will be most sensible of the impossibility of attaining, or even approaching to perfection. Such, indeed, is the condition of human knowledge, that the same observation is applicable to almost every branch of science.

A late learned and reverend prelate has justly remarked, that "a system arising from the collection and arrangement of a multitude of minute particulars, which often elude the most careful search, and sometimes escape observation, when they are most obvious, must always stand in need of improvement." (b)

(a) Law of Bailments.

(b) Preface to Doctor Lowth's Grammar.



ANALYSIS OF THE DIGEST.

- REAL PROPERTY.
- 1. Several Kinds.
 - Tenures by which it is held.
 - 1. Corporeal or Land.
 - Estates therein.
 - 1. Quantity of Interest.
 - 1. Freehold.
 - 1. Estate in Fee Simple.
 - 2. Estate in Tail.
 - 3. Estate for Life.
 - 4. Estate Tail after Possibility, &c.
 - 5. Curtesy.
 - 6. Dower.
 - 7. Jointure.
 - 2. Less than Freehold.
 - 1. Estate for Years.
 - 2. Estate at Will, and at Sufferance.
 - 3. Customary.
 - Copyhold.
 - 4. Equitable.
 - 1. Use.
 - 2. Trust.
 - 5. Upon Condition.
 - 6. As a Pledge or Security.
 - 1. Estate by Statute Merchant, &c.
 - 2. Mortgage.
 - 2. Time of Enjoyment.
 - 1. Possession.
 - 2. Remainder.
 - 3. Reversion.
 - 3. Number and Connexion of the Tenants.
 - 1. Severalty.
 - 2. Joint-tenancy.
 - 3. Coparcenary.
 - 4. Common.
 - 2. Incorporeal.
 - 1. Advowson.
 - 2. Tithes.
 - 3. Common.
 - 4. Ways.
 - 5. Offices.
 - 6. Dignities.
 - 7. Franchises.
 - 8. Rents.
 - 2. Title thereto.
 - 1. Descent.
 - 2. Purchase.
 - 1. Escheat.
 - 2. Prescription.
 - 3. Alienation.
 - 1. Deed.
 - 2. Matter of Record.
 - 1. Private Act.
 - 2. King's Grant.
 - 3. Fine.
 - 4. Recovery.
 - 3. Special Custom.
 - 4. Devise.

The Chapter on Merger has been added by the Editor.

TABLE OF THE TITLES.

<p style="text-align: center;">VOL. I.</p> <p>Title 1. Estate in Fee Simple.</p> <p>2. Estate Tail.</p> <p>3. Estate for Life.</p> <p>4. Estate Tail after Possibility.</p> <p>5. Curtesy.</p> <p>6. Dower.</p> <p>7. Jointure.</p> <p>8. Estate for Years.</p> <p>9. Estate at Will, &c.</p> <p>10. Copyhold.</p> <p>11. Use.</p> <p>12. Trust.</p>		<p style="text-align: center;">VOL. III.</p> <p>Title 21. Advowson.</p> <p>22. Tithes.</p> <p>23. Commons.</p> <p>24. Ways.</p> <p>25. Offices.</p> <p>26. Dignities.</p> <p>27. Franchises.</p> <p>28. Rents.</p> <p>29. Descent.</p> <p>30. Escheat.</p> <p>31. Prescription.</p>
<p style="text-align: center;">VOL. II.</p> <p>13. Estate on Condition.</p> <p>14. Estate by Statute Merchant, &c.</p> <p>15. Mortgage.</p> <p>16. Remainder.</p> <p>17. Reversion.</p> <p>18. Joint Tenancy.</p> <p>19. Coparcenary.</p> <p>20. Tenancy in Common.</p>		<p style="text-align: center;">VOL. IV.</p> <p>32. Deeds.</p> <p style="text-align: center;">VOL. V.</p> <p>33. Private Acts.</p> <p>34. King's Grants.</p> <p>35. Fines.</p> <p>36. Recoveries.</p> <p>37. Alienation by Custom.</p> <p style="text-align: center;">VOL. VI.</p> <p>38. Devise.</p> <p>39. Merger.</p>

VOL. VII.
Appendix and Indexes.

C O N T E N T S

OF THE

FIRST VOLUME.

PRELIMINARY DISSERTATION ON TENURES.

CHAP. I.

Feudal Law.

Sect.		Page
1.	SOURCES of the English Law	1
13.	Origin of Feuds	3
29.	Definition of	8
32.	Different Kinds	<i>id.</i>
35.	Investiture	9
40.	Oath of Fidelity	10
42.	Homage	11
44.	Duties of the Lord and Vassal	<i>id.</i>
47.	Feudal Aids	12
48.	Estate of the Vassal	<i>id.</i>
50.	Was Unalienable	<i>id.</i>
52.	Subinfeudation	13
54.	Estate of the Lord	<i>id.</i>
56.	His Obligation on Eviction	<i>id.</i>
59.	Descent of Feuds	14
67.	Feudum Talliatum	15
69.	Investiture upon a Descent	<i>id.</i>
70.	Relief	16
71.	Escheat	<i>id.</i>
72.	Feudal Forfeitures	<i>id.</i>
78.	The Lord might forfeit his Seignory	17
79.	Feudal Jurisdiction	<i>id.</i>

CHAP. II.

Ancient English Tenures.

1.	Introduction of Feuds	19
5.	Division of Tenures	20
7.	Tenure in Capite	21
13.	Statute of Quia Emptores	22

Sect.		Page
14.	Tenure by Knight Service - - -	<i>id.</i>
18.	Homage - - -	23
21.	Fealty - - -	24
23.	Fruits of Knight Service - - -	<i>id.</i>
24.	Aids - - -	<i>id.</i>
27.	Reliefs - - -	25
29.	Primer Seisin - - -	<i>id.</i>
31.	Wardship - - -	26
33.	Marriage - - -	<i>id.</i>
35.	Fines for Alienation - - -	27
36.	Escheat - - -	<i>id.</i>
37.	Tenure by Grand Serjeanty - - -	<i>id.</i>
40.	Abolition of Military Tenures - - -	28

CHAP. III.

Modern English Tenures.

1.	Manors - - -	29
8.	Courts Baron - - -	32
14.	Inferior Manors - - -	33
17.	How Manors are destroyed - - -	<i>id.</i>
23.	Tenure in Socage - - -	35
26.	By Petit Serjeanty - - -	<i>id.</i>
28.	In Burgage - - -	36
30.	In ancient Demesne - - -	<i>id.</i>
38.	In Gavelkind - - -	38
39.	Incidents to these Tenures - - -	39
48.	Changes in Socage by Stat. 12 Charles II. - - -	41
52.	Tenure in Villenage - - -	42
53.	Copyholds - - -	<i>id.</i>
59.	Free Copyholds - - -	43
62.	Tenure in Frankalmoign - - -	44

TITLE I.

ESTATE IN FEE SIMPLE.

1.	Of real Property - - -	45
2.	Corporeal or Land - - -	<i>id.</i>
4.	Money to be laid out in Land - - -	46
5.	Heir Looms and Charters - - -	<i>id.</i>
7.	Incorporeal - - -	<i>id.</i>
8.	Estates in Land - - -	47
10.	Estates of Freehold - - -	<i>id.</i>
19.	Of Seisin - - -	49
20.	Where an Entry is necessary - - -	<i>id.</i>
27.	Abatement - - -	51
29.	Disseisin - - -	<i>id.</i>
32.	Abeyance of the Freehold - - -	52
35.	Who may have Freehold Estates - - -	53

CONTENTS OF VOL. I.

xix

Sect.		Page
39.	Estates in Fee Simple - - -	54
43.	Abeyance of the Fee - - -	55
45.	All other Estates merge in the Fee - - -	56
48.	Incidents to Estates in Fee Simple - - -	id.
49.	Alienable - - -	id.
51.	Descendible to Heirs General - - -	57
52.	Subject to Curtesy and Dower - - -	id.
53.	Liabie to Debts - - -	id.
60.	Of Crown Debts - - -	60
63.	How Contracted - - -	id.
68.	Bind the Lands when Contracted - - -	61
70.	Into whose hands soever they pass - - -	62
71.	How Discharged - - -	id.
74.	Estates in Fee forfeited for Treason, &c. - - -	63
80.	And for Disclaimer - - -	64
81.	Qualified Fees - - -	id.

TITLE II.

ESTATE TAIL.

CHAP. I.

Of the Origin and Nature of Estates Tail.

1.	Of Conditional Fees - - -	66
8.	Statute De Donis - - -	69
12.	Description of an Estate Tail - - -	70
13.	Tail General and Special - - -	id.
14.	Tail Male and Female - - -	id.
17.	Estates in Frank Marriage - - -	71
19.	Estates Tail are held of the Donor - - -	72
22.	How Created - - -	id.
23.	What may be entailed - - -	id.
30.	Who may be Tenants in Tail - - -	74
31.	Incidents to Estates Tail - - -	id.
32.	Power to commit Waste - - -	id.
36.	Subject to Curtesy and Dower - - -	75
37.	But not to Merger - - -	id.
39.	Tenant in Tail entitled to the Deeds - - -	id.
40.	Is not bound to pay off Incumbrances - - -	id.

CHAP. II.

Power of Tenant in Tail over his Estate, and Modes of Barring it.

1.	Could only Alien for his own Life - - -	77
4.	His alienation not absolutely void - - -	78
6.	Sometimes a Discontinuance - - -	id.
11.	Sometimes voidable by Entry - - -	79
12.	Discontinuance since 31st December, 1833, virtually abolished - - -	id.

Sect.		Page
14.	When Alienation by Tenant in Tail Creates a Base Fee - - - - -	80
17.	Cannot limit an Estate to commence after his Death	<i>id.</i>
20.	Exception - - - - -	83
24.	The Issue not bound by his Ancestor's Contracts -	<i>id.</i>
31.	Unless he confirms them - - - - -	84
33.	Nor subject to his Debts - - - - -	85
34.	Except Crown Debts - - - - -	<i>id.</i>
39.	Tenants in Tail may make Leases - - - - -	87
40.	Are Subject to the Bankrupt Laws - - - - -	<i>id.</i>
45.	And to Forfeiture for Treason - - - - -	90
51.	But not for Felony - - - - -	91
52.	Modes of Barring Estates Tail - - - - -	<i>id.</i>
65.	And Money Entailed - - - - -	97

TITLE III.

ESTATE FOR LIFE.

CHAP. I.

Nature of an Estate for Life and its Incidents.

1.	Description of - - - - -	101
2.	How Created - - - - -	102
9.	Held of the Grantor - - - - -	103
10.	Not Entailable - - - - -	<i>id.</i>
14.	Subject to Merger - - - - -	104
16.	Tenants for Life entitled to Estovers - - - - -	<i>id.</i>
21.	And to Emblements - - - - -	106
26.	May Pray in Aid - - - - -	106
27.	Not bound to pay off Incumbrances - - - - -	<i>id.</i>
28.	But must keep down the Interest - - - - -	<i>id.</i>
29.	When they may keep the Title Deeds - - - - -	107
32.	May Alien their Estates - - - - -	108
	And when constructive Trustees may convey the whole Fee - - - - -	<i>id.</i>
33.	What Acts amount to a Forfeiture - - - - -	<i>id.</i>
43.	General Occupancy - - - - -	110
45.	Estates <i>pour auter vie</i> vest in Executors - - - - -	111
48.	Special Occupancy - - - - -	<i>id.</i>
55.	Ecclesiastical Persons are <i>quasi</i> Tenants for Life -	114

CHAP. II.

Waste by Tenants for Life.

1.	Different Kinds of Waste - - - - -	115
2.	Felling Timber - - - - -	<i>id.</i>
11.	Pulling down Houses - - - - -	117
14.	Opening Pits or Mines - - - - -	118
18.	Changing the Course of Husbandry - - - - -	<i>id.</i>

CONTENTS OF VOL. I.

xxi

Sect.	Page
20. Destruction of Heir Looms - - -	119
21. Permissive Waste - - -	<i>id.</i>
25. Of the Action for Waste - - -	<i>id.</i>
33. Waste restrained in Equity - - -	121
38. The Timber belongs to the Person entitled to the In- heritance - - -	122
46. May be cut down by Order of the Court of Chancery	125
51. Of the Clause without Impeachment of Waste -	127
59. How far restrained in Equity - - -	128
67. Is annexed to the Privy of Estate - - -	130
68. Partial Powers to do Waste - - -	<i>id.</i>
71. Waste by Ecclesiastics - - -	<i>id.</i>
80. Of Accidents by Fire - - -	132

TITLE IV.

ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.

1. How it arises - - -	134
8. Has some Qualities of an Estate Tail - - -	135
9. But is in fact only an Estate for Life - - -	136
10. This Tenant has the Property of the Timber - - -	<i>id.</i>
12. But is restrained from malicious Waste - - -	137
16. His Privileges not Grantable over - - -	<i>id.</i>

TITLE V.

CURTESY.

CHAP. I.

Origin of Estates by the Curtesy, and circumstances required to their Existence.

1. Origin of Curtesy - - -	139
4. Circumstances required - - -	140
5. I. Marriage - - -	<i>id.</i>
6. II. Seisin - - -	<i>id.</i>
15. III. Issue - - -	142
16. Who must be Born alive - - -	<i>id.</i>
17. In the Lifetime of the Wife - - -	143
19. And be capable of inheriting the Estate - - -	<i>id.</i>
24. IV. Death of the Wife - - -	144
25. Curtesy in Gavelkind - - -	<i>id.</i>
26. Who may be Tenants by the Curtesy - - -	<i>id.</i>

CHAP. II.

Of what Things a Man may be Tenant by the Curtesy and Nature of this Estate.

Sect.		Page
1.	Estates in Fee Simple	145
5.	Estates Tail	146
11.	Estates in Coparcenary	147
12.	Trust Estates	<i>id.</i>
13.	Money to be laid out in Land	<i>id.</i>
15.	Equities of Redemption	148
16.	Incorporeal Hereditaments	<i>id.</i>
17.	What Things are not liable to Curtesy	<i>id.</i>
18.	Estates not of Inheritance	<i>id.</i>
22.	Estates in Joint Tenancy	149
23.	Remainders and Reversions	<i>id.</i>
24.	Lands assigned for Dower	<i>id.</i>
25.	Copyhold Estates	<i>id.</i>
26.	Nature of this Estate	<i>id.</i>
31.	Forfeitable for Alienation	150
33.	But not for Adultery	<i>id.</i>
34.	This Tenant is punishable for Waste	<i>id.</i>

TITLE VI.

DOWER.

CHAP. I.

Origin and Nature of Dower.

1.	Origin of Dower	151
5.	Dower at Common Law	153
6.	Dower is a moral right	<i>id.</i>
7.	Dower by Custom	154
11.	Circumstances required	<i>id.</i>
12.	I. Marriage	<i>id.</i>
14.	How proved	155
15.	Effect of Divorces	<i>id.</i>
19.	II. Seisin of the Husband	156
26.	Seisin of Gavelkind Lands	158
27.	III. Death of the Husband	<i>id.</i>
28.	Who may be Endowed	<i>id.</i>
29.	Who are Incapable of Dower	159
30.	Aliens	<i>id.</i>
32.	Jewesses	<i>id.</i>
33.	Women Stolen	<i>id.</i>

CHAP. II.

Of what things Dower may be, and Nature of this Estate.

Sect.		Page
1.	Estates in Fee Simple - - -	160
3.	Estates Tail - - -	161
6.	Qualified or Base Fees - - -	162
7.	Estates in Coparcenary and Common - - -	<i>id.</i>
8.	Remainders and Reversions after Estates for Years - - -	<i>id.</i>
10.	Equities of Redemption of some kinds - - -	<i>id.</i>
11.	Incorporeal Hereditaments - - -	163
12.	Where a Widow has an Election - - -	<i>id.</i>
13.	What things are not liable to Dower - - -	<i>id.</i>
14.	Estates in Joint Tenancy - - -	<i>id.</i>
15.	Estates not of Inheritance - - -	<i>id.</i>
16.	Wrongful Estates - - -	<i>id.</i>
18.	Lands Assigned for Dower - - -	164
22.	A Castle, &c. - - -	<i>id.</i>
23.	Uses, Trusts, and Mortgages - - -	<i>id.</i>
24.	Where Dower and Curtesy cease with the Estate - - -	165
25.	Nature of this Estate - - -	<i>id.</i>
27.	The Dowress entitled to Emblements - - -	<i>id.</i>
28.	Restrained from Alienation - - -	<i>id.</i>
30.	And from Waste - - -	166
32.	Not subject to her Husband's Incumbrances - - -	<i>id.</i>
33.	In some cases Dower depends upon the election of third Persons - - -	<i>id.</i>

CHAP. III.

Assignment of Dower, and Modes of Recovering it.

1.	Necessity of an Assignment - - -	168
3.	Who may assign Dower - - -	<i>id.</i>
6.	How it is to be Assigned - - -	169
16.	Remedies against an improper Assignment - - -	171
21.	Effect of an Assignment of Dower - - -	172
24.	Actions for Recovering - - -	<i>id.</i>
25.	May be obtained in Chancery - - -	<i>id.</i>
28.	Arrears not recoverable after Six Years - - -	173

CHAP. IV.

What will Operate as a Bar or Satisfaction of Dower.

2.	Attainder of the Husband - - -	174
4.	Attainder of the Wife - - -	175
5.	Elopement with an Adulterer - - -	<i>id.</i>

Sect.		Page
12.	Detinue of Charters - - -	176
14.	Fine or Recovery - - -	177
15.	Bargain and Sale in London - - -	<i>id.</i>
16.	Jointure - - -	<i>id.</i>
17.	An outstanding Term - - -	<i>id.</i>
18.	A Devise is no Bar to Dower - - -	178
23.	Unless so expressed, when the Widow has an election	180
28.	Sometimes held a Satisfaction - - -	181
31.	A Bequest of Personal Estate no Bar to Dower - - -	185

TITLE VII.

JOINTURE.

CHAP. I.

Of the Origin and Nature of Jointures.

1.	Origin of Jointures - - -	187
5.	Definition of - - -	189
6.	Circumstances required - - -	<i>id.</i>
7.	I. Must commence on the Death of the Husband	<i>id.</i>
9.	II. And be for the Life of the Wife - - -	190
12.	III. Must be limited to the Wife herself - - -	<i>id.</i>
13.	This Rule is not admitted in Equity - - -	<i>id.</i>
17.	IV. It must be in Satisfaction of her whole Dower	191
18.	V. And be so expressed - - -	<i>id.</i>
21.	VI. And made before Marriage - - -	192
22.	Jointures which require the Acceptance of the Widow	<i>id.</i>
25.	Cases where the Widow takes the Estate and Dower	193
26.	Copyhold not a Legal Bar to Dower, though good in Equity - - -	194
27.	Equitable Jointures - - -	<i>id.</i>
31.	Who may limit a Jointure - - -	195
35.	Who may take a Jointure - - -	<i>id.</i>
36.	An Infant is Barred by a Jointure - - -	<i>id.</i>
40.	An Infant not Bound by uncertain or precarious Jointure	200
41.	Nature of this Estate - - -	<i>id.</i>
42.	Jointress may not commit Waste - - -	<i>id.</i>
45.	Contribution by Jointress - - -	201
46.	Jointress not Entitled to Emblements - - -	<i>id.</i>
47.	Not Liable to Crown Debts - - -	<i>id.</i>
48.	A Rent Charge is usually given as a Jointure - - -	<i>id.</i>
49.	Effect of the Eviction of a Jointure - - -	<i>id.</i>

CHAP. II.

Where a Jointress is aided in Equity.

Sect.		Page
1.	A Jointress is deemed a Purchaser - -	203
4.	Though the Settlement be unequal - -	204
7.	Relieved against a Voluntary Conveyance - -	205
8.	Not against a <i>bonâ fide</i> Purchaser without notice -	<i>id.</i>
9.	Relieved where a Power to Jointure defectively exercised -	<i>id.</i>
10.	And against a satisfied Term - -	<i>id.</i>
11.	Not bound by neglect during the Coverture -	<i>id.</i>
14.	Nor to deliver up Title Deeds - -	206
17.	Sometimes allowed Interest for Arrears - -	<i>id.</i>
18.	Effect of a Covenant that the Lands are of a certain Value - - - -	207

CHAP. III.

What will operate as a Bar or Satisfaction of a Jointure.

1.	Fine or Recovery by the Wife - -	208
3.	Not barred by the Attainder of the Husband -	209
4.	Nor by Elopement of the Wife - -	<i>id.</i>
7.	A Devise is no Bar to a Jointure - -	210
13.	Unless so expressed, when the Widow has an Election - - - -	220
15.	A Devise sometimes held a Satisfaction - -	<i>id.</i>

TITLE VIII.

ESTATE FOR YEARS.

CHAP. I.

Origin and Nature of Estates for Years.

1.	Estates less than Freehold - - -	222
2.	Origin of Estates for Years - - -	<i>id.</i>
3.	Description of - - -	223
9.	Introduction of long Terms - - -	224
10.	Tenant for Years has no Seisin - - -	<i>id.</i>
12.	But must make an Entry - - -	225
15.	An Entry before the Lease begins is a Disseisin -	<i>id.</i>
18.	Estates for Years may commence <i>in futuro</i> -	226
19.	And be assigned before Entry - - -	<i>id.</i>
22.	May determine by Proviso - - -	227
23.	Are Chattels real - - -	<i>id.</i>
24.	And vest in Executors - - -	<i>id.</i>
34.	A Freehold cannot be derived from a Term -	229

CHAP. II.

Of the Incidents to Estates for Years.

Sect.		Page
1.	Tenants for Years entitled to Estovers - -	230
2.	But cannot commit Waste - -	<i>id.</i>
12.	Clause without Impeachment of Waste - -	233
16.	Accidents by Fire - -	<i>id.</i>
18.	When entitled to Emblements - -	<i>id.</i>
19.	Estates for Years subject to Debts - -	234
20.	Of Crown Debts - -	<i>id.</i>
23.	Alienable - -	<i>id.</i>
	And may be limited for Life with a Remainder over -	235
24.	But not Entailed - -	<i>id.</i>
28.	Merged by a Union with the Freehold - -	236
31.	But not before Entry of Termor, it being then an <i>interesse termini</i> - -	237
34.	By Surrender - -	<i>id.</i>
43.	Terms merge in Terms - -	240
47.	Equity relieves against Merger - -	<i>id.</i>
50.	How forfeited - -	241

TITLE IX.

ESTATE AT WILL AND AT SUFFERANCE.

CHAP. I.

Estate at Will.

1.	Description of - -	242
3.	May arise by Implication - -	243
4.	Or by Deed - -	<i>id.</i>
6.	Is at the Will of both Parties - -	<i>id.</i>
7.	Not grantable over - -	244
9.	Tenant at Will sometimes entitled to Emblements -	<i>id.</i>
11.	Cannot commit Waste - -	<i>id.</i>
12.	What determines this Estate - -	<i>id.</i>
15.	Six Months' notice to quit necessary - -	245
16.	Tenancies from Year to Year - -	<i>id.</i>
23.	Bind the Persons in Reversion - -	247
24.	And devolve to Executors - -	<i>id.</i>
26.	Six Months' notice to quit necessary - -	248

CHAP. II.

Estate at Sufferance.

1.	Description of - -	249
5.	Tenant of this Estate to pay double Value after Notice	250
6.	Who may give Notice - -	<i>id.</i>

CONTENTS OF VOL. I.

xxvii

Sect.		Page
7.	At what Time - - -	250
9.	Acceptance of Single Rent no Bar to Recovery -	251
11.	Tenants giving Notice to Quit, and holding over, to pay Double Rent - - -	id.

TITLE X.

COPYHOLD.

CHAP. I.

Nature of Copyholds.

2.	Description of - - -	254
6.	Free Copyholds or Customary Freeholds -	id.
9.	When the Freehold in the Lord -	255
14.	When the Freehold in the Tenant -	257
17.	Circumstances necessary to their Existence -	259
18.	A Manor - - -	id.
19.	A Court - - -	id.
30.	The Things granted must be Parcel of the Manor -	261
31.	And demised or demisable by Copy -	id.
36.	Wastes when grantable - - -	263
38.	What will destroy the Custom of granting -	id.
43.	What may be granted by Copy -	264
49.	Copyhold Customs - - -	265
51.	How proved - - -	266
54.	Copyhold Jurisdictions - - -	267
60.	Rights of the Lord - - -	268

CHAP. II.

Copyhold Grants.

1.	Nature of - - -	269
3.	All Lords of Manors may make Grants -	id.
10.	Though under Personal Disabilities -	271
12.	Provided they have a Lawful Estate -	id.
14.	A Steward may make Grants - - -	id.
18.	To whom Grants may be made - - -	272
21.	Estates in Fee, and, where the Custom authorises, Estates in Tail may be granted - -	273
27.	And Estates for Life or Lives - - -	274
28.	No General Occupancy - - -	275
31.	But Special Occupancy allowed - - -	id.
33.	The Custom must be observed - - -	276
43.	Copyhold Grants take place of many other Estates -	279

CHAP. III.

Incidents to Copyholds.

Sect.		Page
1.	Copyholders subject to Fealty	280
3.	Entitled to Estovers	<i>id.</i>
7.	But cannot in general commit Waste	281
16.	Copyholds are descendible	283
17.	Alienable and devisable	<i>id.</i>
18.	May be leased for Years	284
21.	Not liable to Debts	<i>id.</i>
22.	Subject to Free Bench	<i>id.</i>
32.	Which may be barred by a Jointure	286
34.	And by the Alienation of the Husband	<i>id.</i>
41.	Or even an Agreement to convey	288
45.	And by Forfeiture	289
46.	And by a Grant of the Freehold to the Husband	<i>id.</i>
47.	A Devise may bar Free Bench	<i>id.</i>
49.	Subject to Curtesy	290
54.	What Statutes extend to Copyholds	291

CHAP. IV.

Fines and Heriots.

1.	Fines upon Descent	292
3.	Upon Voluntary Grants	<i>id.</i>
4.	Upon Admission of Tenants by the Curtesy	293
5.	Upon Alienation generally	<i>id.</i>
7.	Upon Alienation on Bankruptcy	<i>id.</i>
8.	Upon Alienation on Insolvency	<i>id.</i>
9.	Upon a Devise	294
11.	Not due from Remainder-men	<i>id.</i>
14.	Without a Special Custom	295
16.	Nor without a Change of the Tenant	296
17.	Or an Agreement to surrender	<i>id.</i>
19.	Only due on Admittance	<i>id.</i>
24.	Fines on Change of the Lord	297
29.	No more than Two Years' value can be demanded	300
39.	Except on Voluntary Grants	302
40.	Fines must be assessed Severally	303
41.	When Payable	<i>id.</i>
42.	How recovered	<i>id.</i>
46.	Heriots	304

CHAP. V.

Forfeiture of Copyholds.

2.	Attainder of Treason or Felony	307
5.	Alienation contrary to the Custom	308
8.	Leases contrary to the Custom	<i>id.</i>
11.	Unless by Licence of the Lord	309

CONTENTS OF VOL. I.

xxix

Sect.		Page
13.	A Covenant that a Person shall enjoy is no Forfeiture	309
17.	Waste - - -	310
19.	Disclaiming the Tenure - - -	<i>id.</i>
20.	Refusal to perform the Services - - -	311
25.	Refusal to pay Fines - - -	<i>id.</i>
27.	Refusal to pay Rent - - -	312
30.	Non-appearance of the Heir to be Admitted - - -	<i>id.</i>
35.	Of a Person in Remainder - - -	315
38.	Of a Surrenderee - - -	316
39.	Of a Devisee - - -	317
41.	Who may Forfeit - - -	<i>id.</i>
46.	Extent of Forfeitures - - -	318
48.	Where Presentment is necessary - - -	<i>id.</i>
50.	What dispenses with a Forfeiture - - -	<i>id.</i>
56.	Who may take Advantage of a Forfeiture - - -	320
59.	Where Equity relieves - - -	<i>id.</i>
63.	Where Relief has been refused - - -	321

CHAP. VI.

Extinguishment and Suspension of Copyholds.

2.	Surrender to the Lord - - -	324
8.	Release to the Lord - - -	325
10.	Conveyance by the Lord to the Copyholder - - -	<i>id.</i>
13.	Enfranchisement - - -	326
20.	Escheat or Forfeiture - - -	328
21.	When Lands cease to be demisable - - -	<i>id.</i>
22.	Suspension of Copyholds - - -	<i>id.</i>

TITLE XI.

USE.

CHAP. I.

Origin of Uses

1.	Origin of Uses - - -	330
5.	Derived from the <i>Fidei Commissum</i> - - -	331
11.	Jurisdiction of the Chancellor - - -	333
13.	Invention of the Writ of Subpoena - - -	<i>id.</i>

CHAP. II.

Nature of a Use before the Statute 27 Hen. 8. c. 10.

1.	A Use was a Right in Conscience only - - -	336
8.	Founded on Confidence in the Person - - -	338
12.	And Privity of Estate - - -	339
15.	Who might be seised to Uses - - -	340

Sect.		Page
19.	What might be conveyed to - -	341
20.	Rules by which they were governed - -	<i>id.</i>
21.	Could not be raised without Consideration - -	<i>id.</i>
22.	Not an Object of Tenure - -	<i>id.</i>
24.	Not subject to Forfeiture - -	342
26.	Not extendible or Assets - -	<i>id.</i>
27.	Not subject to Curtesy or Dower - -	<i>id.</i>
28.	Uses were alienable - -	<i>id.</i>
32.	Without words of Limitation - -	343
33.	Might commence <i>in futuro</i> - -	<i>id.</i>
34.	Might be revoked - -	<i>id.</i>
35.	And change by Matter subsequent - -	<i>id.</i>
36.	Were devisable - -	344
38.	And descendible - -	<i>id.</i>
40.	Inconveniences of Uses - -	<i>id.</i>
41.	Statutes made to Remedy them - -	345
45.	Distinction between Uses and Trusts before the Statute 27 Hen. 8. c. 10 - -	346

CHAP. III.

Statute 27 Hen. 8. c. 10. of Uses.

1.	Statement of the Statute - -	347
5.	Circumstances necessary to its Operation - -	349
6.	I. A person seised to a Use - -	<i>id.</i>
7.	What Persons may be seised to Uses - -	<i>id.</i>
11.	Of what Estates - -	350
12.	Estates Tail - -	<i>id.</i>
17.	Estates for Life - -	353
20.	What may be conveyed to Uses - -	<i>id.</i>
23.	II. A <i>Cestui que Use in Esse</i> - -	354
26.	In what Cases the Statute operates - -	<i>id.</i>
34.	III. A Use <i>in esse</i> - -	358
35.	The Statute then transfers the Possession - -	<i>id.</i>
37.	Saving of all former Estates - -	<i>id.</i>

CHAP. IV.

Modern Doctrine of Uses.

1.	Construction of the Statute - -	362
3.	Contingent Uses - -	363
4.	Uses arising on the Execution of Powers - -	<i>id.</i>
9.	Conveyances derived from the Statute of Uses - -	365
15.	Whether the Statute extends to Devises - -	367
19.	Resulting Uses - -	370
35.	Uses by Implication - -	374
38.	No Use results but to the Owner of the Estate - -	<i>id.</i>
40.	Nor against the Intent of the Parties - -	375
44.	Which may be proved by Parol Evidence - -	375

Sect.	Page
45. Nor which is inconsistent with the Estate limited	376
50. Nor on an estate Tail, for Life, or Years	<i>id.</i>
54. Nor on a Devise	377
55. What Use results to a Tenant in Tail	378

TITLE XII.

TRUST.

CHAP. I.

Origin and Nature of Trust Estates.

1. Origin of Trusts	381
3. Description of	<i>id.</i>
4. A Use limited upon a Use	<i>id.</i>
14. Limitation to Trustees to pay over the Rents	384
16. Trust for the separate Use of a Woman	385
21. Trust to sell, or to raise Money	386
25. Or for any other purpose to which a Seisin is necessary	387
34. A Trust Estate limited after Payment of Debts, vests immediately	389
35. Term for Years limited in Trust	<i>id.</i>
36. How Trusts may be declared	390
40. Resulting or implied Trusts	391
41. Contract for a Purchase	<i>id.</i>
42. Purchase in the name of a Stranger	<i>id.</i>
48. Purchase with Trust Money	392
52. Conveyance without Consideration	394
55. A Trust declared in Part	<i>id.</i>
57. Or which cannot take Effect	395
59. Exception	<i>id.</i>
61. Where no Appointment is made	396
62. Renewal of a Lease by a Trustee	<i>id.</i>
64. Or by Persons having only a particular Estate	397
66. Where there is Fraud	<i>id.</i>
67. Trusts of Copyholds	<i>id.</i>
73. A Purchase in the name of a Child is an Advancement	398
81. Exception—Children emancipated	402
83. And also a Wife	<i>id.</i>
86. No Trust between Lessor and Lessee	403
87. Trusts Executed distinguished from Trusts Executory	<i>id.</i>
89. Who may be Trustees	<i>id.</i>

CHAP. II.

Rules by which Trust Estates of Freehold are Governed.

1. A Trust is equivalent to the legal Ownership	405
6. Trusts are Alienable	406
9. Devisable and Descendible	407
10. May be intailed	<i>id.</i>

Sect.		Page
11.	And also limited for Life - - -	407
12.	Subject to Curtesy - - -	<i>id.</i>
16.	When subject to Dower - - -	409
22.	Not to Free Bench - - -	410
25.	Forfeitable for Treason - - -	411
27.	But not for Felony - - -	412
29.	Not subject to Escheat - - -	<i>id.</i>
30.	Liabie to Crown Debts - - -	<i>id.</i>
31.	And to all other Debts - - -	413
34.	Merge in the Legal Estate - - -	<i>id.</i>
36.	Where a Legal Estate is a Bar in Ejectment - - -	414
39.	Where a Reconveyance will be presumed - - -	415

CHAP. III.

Rules by which Trust Terms are Governed.

1.	Terms in Gross - - -	417
6.	Terms attendant on the Inheritance - - -	418
9.	How Terms become attendant - - -	419
22.	When a Term is in Gross - - -	423
27.	A Term attendant may become a Term in Gross - - -	425
29.	Terms attendant are part of the Inheritance - - -	<i>id.</i>
31.	Are Real Assets - - -	426
32.	Not Forfeited for Felony - - -	<i>id.</i>
33.	Trust Terms protect Purchasers from Mesne Incumbrances - - -	<i>id.</i>
39.	And also from Dower - - -	429
44.	Must be assigned to a Trustee for the Purchaser - - -	439
46.	A Term will not protect the Heir from Dower - - -	441
49.	Nor the Assignees of a Bankrupt - - -	442
50.	Neither Jointure nor Curtesy barred by a Term - - -	<i>id.</i>
52.	Where a Term is a Bar in Ejectment - - -	<i>id.</i>

CHAP. IV.

Estate and Duty of Trustees.

1.	Estate of Trustees - - -	447
6.	Duty of Trustees - - -	448
11.	Their Acts not prejudicial to the Trust - - -	449
12.	Exception—Conveyance without Notice - - -	<i>id.</i>
17.	Where Purchasers are bound to see Trusts performed - - -	450
24.	Where they are not bound - - -	451
32.	Where the Receipt of the Trustee is sufficient - - -	453
39.	Trustees have equal Power, &c. - - -	455
41.	Can derive no Benefit from the Trust - - -	<i>id.</i>
42.	Bound to reimburse the Cestui que Trust - - -	<i>id.</i>
45.	Have no Allowance for Trouble - - -	456
48.	But allowed all Costs and Expenses - - -	457
52.	Trustees seldom permitted to purchase the Trust Estate - - -	<i>id.</i>
63.	Refusing to act must release or disclaim - - -	460
64.	Discharged and others appointed - - -	<i>id.</i>

A DIGEST
OF
The Laws of England

RESPECTING
REAL PROPERTY.

PRELIMINARY DISSERTATION ON TENURES.

CHAP. I.
Feudal Law.

CHAP. II.
Ancient English Tenures.

CHAP. III.
Modern English Tenures.

CHAP. I.
Feudal Law.

SECT. 1. *Sources of the English Law.*

- 13. *Origin of Feuds.*
- 29. *Definition of.*
- 32. *Different Kinds.*
- 35. *Investiture.*
- 40. *Oath of Fidelity.*
- 42. *Homage.*
- 44. *Duties of the Lord and Vassal.*
- 47. *Feudal Aids.*
- 48. *Estate of the Vassal.*
- 50. *Was unalienable.*
- 52. *Subinfeudation.*

SECT. 54. *Estate of the Lord.*

- 56. *His Obligation on Eviction.*
- 59. *Descent of Feuds.*
- 67. *Feudum Talliatum.*
- 69. *Investiture upon a Descent.*
- 70. *Relief.*
- 71. *Escheat.*
- 72. *Feudal Forfeiture.*
- 78. *The Lord might forfeit his
Seignory.*
- 79. *Feudal Jurisdiction.*

SECTION I.

IT is generally agreed that the laws of England are derived from those of the northern nations, who, migrating from the forests of Germany, overturned the Roman empire, and established themselves in the southern parts of Europe.

Sources of the
English law.

2. Both the Danes and Saxons were undoubtedly swarms from the northern hive: it may therefore be presumed that the description which Tacitus has left us of the manners and customs of the Germans is in every respect applicable to them. And as the Saxons upon their establishment in England exterminated, rather than subdued, the ancient inhabitants, they introduced their own laws, without adopting the smallest portion of those which prevailed among the ancient Britons.

Henault Ab.

3. The French nation also derive their origin from a tribe of Germans who crossed the Rhine under Clovis about the year 481, and established themselves in the northern provinces of France.

4. The different German tribes were first governed by codes of laws formed by their respective chiefs. One of the most ancient of these is the Salic law, which is generally supposed to have been written in the fifth century.

Esprit des
Loix, L. 28.
c. 1.

5. Montesquieu says,—the tribe of the Riparian Franks having united themselves to the Salian Franks under Clovis, preserved their original customs. That Theodoric, king of Austrasia, caused them to be reduced into writing; and also collected the laws of the Bavarians and Germans, who were subject to his kingdom. As to the Saxons, Charlemagne, who was their first conqueror, gave them a code of laws which is still extant.

6. While Clovis and his descendants governed France that country was ruled by the Theodosian code and the laws of the different German tribes who had settled there. But the Theodosian code was in course of time abrogated or forgotten; because great advantages were allowed to those who lived under the Salic Law.

7. During the reigns of the first French monarchs, a general assembly of the nation took place every year, in the month of March, afterwards in the month of May; where many ordinances were made which acquired the force of law, and were called *Capitularii*.

Montesq.
L. 28. c. 9.

8. The introduction of feuds produced a variety of regulations inconsistent with the ancient codes of laws; and France became at that time divided into an infinite number of small seigniories, whose lords acknowledged a feudal dependency only, not a political one, on the monarch. In consequence of this circumstance it became impossible that they should all be regulated by the same laws. The codes of the Germans and the *Capitularia*,

were superseded by these local customs ; each seignior and province had its own ; and there were scarce two seigniories in the whole kingdom whose customs agreed in every particular.

9. Several of these customs were collected and published in the course of the fifteenth century, under the directions of the kings of France, and authenticated by the most eminent lawyers and magistrates of the different provinces ; but they had in general been put into writing by private individuals long before that period.

10. Normandy, like all other provinces of France, was governed by its own customs. When it was ceded to Rollo in the year 912, to be held of the crown of France by homage and fealty, he caused an enquiry to be made into its ancient usages, and added his sanction to their former authority. Now as Normandy did not experience those troubles and revolutions which disturbed the other parts of France, during the tenth and eleventh centuries, it is generally supposed that the original laws and customs of the Franks were preserved with more purity, and suffered less from a mixture of the canon and civil law in Normandy, than in any other province of France.

Houard's
Lit. Pref.

11. Upon the establishment of the Normans in England, the whole customary law of that province, which according to Basnage, one of its best commentators, had been already reduced into writing, was introduced here ; and as our kings had great possessions in France, and frequently visited that country for two centuries after the Conquest, they borrowed from the French many of the improvements which were made in their jurisprudence, and established them in England.

12. If these facts are admitted, it will follow that the primeval customs of the Germans, as described by Tacitus ; the codes of the different German tribes (a), together with the laws of the Germans during the middle ages ; the *Capitularia* of the French monarchs of the two first races ; and the customs of the different provinces of France, particularly those of Normandy, which were chiefly founded on feudal principles ; are the real sources from which our ancient laws can, with any certainty, be deduced.

13. In the ninth and tenth centuries there were only two tenures, or modes of holding lands upon the continent, which

Origin of
Feuds.

(a) Sir H. Spelman says, — *In legibus Henrici I. Regis Angliæ multa reperio e Legè Salicâ deprompta ; interdum nominatim, interdum verbatim.* — Gloss. Voc. Lex.

Dumoulin,
Art. 46. n. 1.

were called Allodial and Feudal. Allodial lands were those whereof the owner had the *dominium directum et verum*; the complete and absolute property, free from all services to any particular lord. *Allodium proprietas quæ à nullo recognoscitur. Tenere in Allodium, id est, in plenam et absolutam proprietatem. Habet integrum et directum dominium quale à principio de jure gentium fuit distributum et distinctum.* So that the owner of an *Allodium* could dispose of it at his pleasure; or transmit it as an inheritance to his children.

14. A feud was a tract of land acquired by the voluntary and gratuitous donation of a superior; and held on condition of fidelity and certain services, which were in general of a military nature. The tenure of the feudatory was of the most precarious kind, depending entirely on the will and pleasure of the person who granted; and this singular system was derived from the following circumstances:—

De Bello Gal.
Lib. 6. c. 21.
De Mor. Ger.
c. 26.

15. We learn from Cæsar and Tacitus that the individual German had no private property in land; that it was his nation or tribe which allowed him annually a portion of ground for his support; that the ultimate property, or *dominium verum* of the lands, was vested in the tribe; and that the portions dealt out to individuals returned to the public, after they had reaped the fruits of them. Thus Tacitus says,—*Agri pro numero cultorum ab universis per vices occupantur, quos mox inter se secundum dignationem partiuntur. Facilitatem partiendi camporum spatia præstant; arva per annos mutant, et superest ager.*

16. With these ideas and this practice the Germans made conquests. When they had acquired a province of the empire, the land became the property of the victorious nation; each individual laid claim to a share of it; a tract of ground was accordingly marked out for the leader of the expedition; and, to the inferior orders, portions, corresponding to their respective merits and importance, were allotted.

17. As the quantity of land thus acquired was not sufficient to allow of an annual change; and as the increased knowledge of agriculture, and the refinement of manners which then took place would have rendered such an annual change extremely inconvenient; the lands thus given became the permanent property of the occupiers.

18. The situation of a German tribe on its first establishment

in a conquered country being extremely precarious, the necessity of defence induced the chiefs to annex to each grant or allotment of land a condition of military service. The generality of writers have concluded from this circumstance, that the allotments of land originally made to the individuals of a German tribe, on their first establishment in a conquered country, were mere *beneficia*, or feuds, and have derived from thence the origin of the Feudal Law. But a variety of arguments may be produced to prove that the lands thus granted were not feuds.

19. It is universally admitted that feuds were originally voluntary and gratuitous donations, to be held at the mere will of the giver, who could resume them at pleasure. Now when the Germans first settled in the southern parts of Europe, they enjoyed a very great degree of liberty; and upon the distribution of the lands in a conquered province, each individual claimed that portion of them to which his rank and services entitled him, not as a favour, but as a right, being the just reward of his toils. Nor can it be supposed that a people who did not conquer for their chiefs only, but also for themselves, should submit to hold their acquisitions as the voluntary and gratuitous donations of their leader, and on so precarious a tenure as his will and pleasure.

Robertson's
Hist. of Cha. V.
Vol. I. 254. 8vo.

20. The feudal system was not generally established till some centuries after the settlement of the German nations in Italy and France; nor did the circumstance of annexing a condition of military service to a grant of lands imply that they were held by a feudal tenure; for the possessors of allodial property, who were in France called *Liberi Homines*, were bound to the performance of military service; and some very respectable French writers, among whom is Mons. Bouquet, derive the word *allodium* from *los*, which signifies *lot*; and, from this etymology, conclude that allodial property was that which was acquired by lot, upon the distribution of lands among the Franks.

Droit Pub.
Robertson's
Hist. of Cha. V.
Vol. I. 256. 8vo.
Sismondi
Hist. des Français, tom. 3.
219.

21. The original idea of feuds appears to have been derived from the following circumstances. Tacitus says, the chief men among the Germans endeavoured to attach to their persons and interests certain adherents whom they called *Comites*: — *Insignis nobilitas, aut magna patrum merita, principis dignationem etiam adolescentibus adsignant. Ceteri robustioribus ac jam pridem probatis aggregantur; nec rubor inter comites aspici. Gradus quine-*

tiam et ipse comitus habet, iudicio ejus, quem sectantur; magnaque et comitum æmulatio, quibus primus apud principem suum locus; et principum cui plurimi et acerrimi comites. Hæc dignitas, hæ vires, magno semper electorum juvenum globo circumdari; in pace decus, in bello præsidium.

Balus, Vol. II.
898—928.
Montesq. id.
c. 16.

22. This custom was continued by the German princes in their new settlements; those *comites* or attendants were called *Vassi*, *Antrustiones*, *Leudes*, *Homines in truste regis*. The composition paid for the murder of a person of this description, the only standard by which we are enabled to judge of the rank and condition of persons in the middle ages, was triple to that paid for the murder of a common freeman.

c. 14.

Du Cange
Gloss Voc.
Fiscus.

Balus, Vol. I.
453. Vol. II.
875.

23. While the German tribes remained in their own country, they courted and preserved the favour of their *comites* by presents of arms and horses, and by hospitality. Thus Tacitus says—*Exigunt (comites) principis sui liberalitate illum bellatorum equum, illam cruentam victricemque Trameam; nam epulæ, et quamquam incompti, largi tamen apparatus pro stipendio cedunt.* When these princes settled in the countries they had conquered, they bestowed a part of the lands allotted to them, which were known by the name of *Fiscus Regis*, or *Domanium Regis*, on their adherents as the reward of their fidelity. These donations were originally called *Beneficia*, because they were gratuitous; in course of time they acquired the name of *Feuda*. The persons to whom this kind of property was given became thereby subject to fidelity, and the performance of military services to those from whom they received them.

24. Mons. Bignon, in his notes on the Formulæ of Marculphus, says,—*Proprietate et Fisco duæ notantur bonorum species: et velut maxima rerum divisio quæ eo seculo recepta erat, omnia namque prædia aut propria erant, aut fiscalia. Propria seu proprietates dicebantur quæ nullius juri obnoxia erant, sed optimo maximo jure possidebantur; ideoque ad hæredes transibant. Fiscalia vero beneficia, sive fisci, vocabantur quæ a rege ut plurimum, postea quæ ab aliis, ita concedebantur, ut certis legibus servitiisque obnoxia, cum vitâ accipientis finirentur.*

Dissert. II.

25. The learned Muratori, in his *Antiquitates Italici Medii Ævi*, has given a Dissertation on Allodial and Feudal Tenures. He states that feuds derive their origin from the Germans, and were originally called *Beneficia*. That the ancient *Vassi et Vas-*

sali were persons who attached themselves to kings and princes, in order to acquire the privileges to which those who formed a part of their families were entitled ; and also in the hope of obtaining, from the liberality of their lords, *beneficia*, that is, the usufruct of a portion of their royal demesnes, during the lives of their lords. That whenever a person of noble birth attached himself in this manner to a prince, he took an oath of fidelity to him, and was afterwards called *Vassus* or *Vassallus* ; which words occurred in a *Capitularium* of Louis the Pious, of the year 823. That to constitute a *vassus* it was not necessary he should have a *beneficium*. That an *allodium* was an inheritance was an inheritance which might be alienated at the pleasure of the possessor ; and the words by which it was granted usually were, — *ut proprietario jure teneat atque possideat ; seu faciat inde quicquid voluerit, tam ipse quamque hæredes ipsius*.

26. Although feuds were originally granted by kings and princes only ; yet in a short time the great lords to whom the kings had allotted extensive tracts of land, partly from a disposition to imitate their superiors, and partly for the purpose of attaching persons to their particular fortunes, bestowed a portion of their demesnes as benefices or feuds. The greater part of the lands in Italy and France, were, however, held by an allodial tenure, till the beginning of the tenth century, when the feudal system appears to have been generally adopted in those countries.

27. As allodial property was much more desirable than feudal, such a change appears surprising ; especially when we are informed that allodial property was frequently converted into feudal by the voluntary deed of the possessor. The reasons which induced the proprietors of allodial lands to convert them into feuds are thus explained by the president Montesquieu :—Those who held feuds were entitled to great privileges : the composition or fine for the commission of a crime against a feudatory was much greater than that for a person who held his lands by an allodial tenure. But the chief motive for this alteration was, to acquire the protection of some powerful lord, without which, in those times of anarchy and confusion, it was scarce possible for an individual to preserve either his liberty or his property. These, and probably other reasons with which we are unacquainted, produced an extension of the feudal tenure over the whole western world.

Esprit des
Loix, L. 31.
c. 8.

Hervé, Vol. I.
102.

Giannone,
Lib. 13. c. 3.

28. Feuds upon their first introduction were regulated by unwritten customs. In the year 1170 the Emperor Frederick Barbarossa directed a code of the feudal law to be compiled, which was accordingly executed, and published at Milan. It was called *The Liber Feudorum*; and was divided into five books, of which the two first, and some fragments of the three last, still exist, and are printed at the end of all the modern editions of the *Corpus Juris Civilis*. This work is probably no more than a collection of the customs most generally adhered to in feudal matters, and the constitutions of the Emperors Lotharius, Conrad, and Frederick, respecting feuds.

Definition of.

29. A feud is thus defined by Craig:—*Est feudum beneficium, seu benevola et libera rei immobilis, aut aquipollentis, concessio, cum utilis dominii translatione; retenta proprietate, seu dominio directo; sub fidelitate, et exhibitione servitiorum honestorum.*

30. It was *benevola et libera concessio*; being supposed to have been originally granted from motives of mere benevolence, and not for any sum of money, or other valuable consideration. Or, as it is expressed in the *Liber Feudorum*,—*Tantum ex amore et honore acquirendum est feudum rei immobilis*, that is, nothing but land or immoveable property could be granted as a feud.

Dominii utilis.—The civilians distinguish between the *proprietas* and the *dominium utile*. The *proprietas* is the absolute property; the *dominium utile* is only the right of using the thing for a certain time.

Sub fidelitate.—This was the bond of connexion between the lord and his vassal; and the most essential circumstance in the contract, as will be shown hereafter.

Servitiorum.—Services were also essential to a feud. They were generally of a military nature: but still feuds were not unfrequently granted in consideration of other services.

Hervé, Vol. I.
370—372.

31. A modern French writer observes that it will appear, from an attentive consideration of the origin and progress of feuds, to have been the intention of the person creating a feud, to secure a constant acknowledgement of the grant as long as it subsisted; in which it differed from all other grants; and therefore that a gift of a feud ought to be defined,—“*Une concession faite à la charge d'une reconnaissance toujours subsistante, qui doit se manifester de la manière convenue.*”

Different

32. The first and most general division of feuds was into

proper and improper ones. Proper feuds were such as were purely military, given *militiæ gratiâ*, without price, to persons duly qualified for military service. Improper feuds were those which did not, in point of acquisition, services, and the like, strictly conform to the nature of a mere military feud; such as those that were sold or bartered for any equivalent, or granted free from all services, or in consideration of any *certain* return of services.

33. A feud was, however, always considered as a proper one, unless the contrary appeared, which could only be proved by a reference to the original investiture. Hence arose the maxim in the feudal law, — *Tenor investituræ inspiciendus*. But improper feuds were distinguished from proper ones by those qualities only in which they varied; for in all other respects they were considered as proper ones.

34. A *feudum ligium* was that for which the vassal owed fealty to his lord against all persons whatever, without any exception. A *feudum non ligium* was that for which the vassal owed fealty to his immediate lord; but with an exception in favour of some superior lord. A *feudum antiquum* was that which had descended to the vassal from his father, or some more remote ancestor. A *feudum novum* was that which was originally acquired by the vassal himself. A feud granted by a sovereign prince, to hold immediately of himself, with a jurisdiction, was called *feudum nobile*, and conferred nobility on the grantee. Where a title of honour was annexed to the lands so granted, it was called *feudum dignitatis*.

Craig, Lib. 1.
Tit. 10. s. 11.

Id. s. 12.

35. Feuds were originally granted by a solemn and public delivery of the very land itself by the lord to the vassal, in the presence of the *convassalli*, or other vassals of the lord, which was called *investitura*; and is thus described by Corvinus, — *Investitura ab investiendo dicta, quod per eam vassallus possessione quasi vesti induatur*. And this ceremony was so essentially necessary to the creation of a feud, that it could not be constituted without it. *Sciendum est feudum sine investitura nullo modo constitui posse*.

Investiture.

Lib. Feud. I.
Tit. 25.

36. The *convassalli*, or *pares*, were the only persons who could be witnesses to the investiture; their presence was required as much for the advantage of the lord as of the tenant. Of the lord, that if the tenant was a secret enemy, or otherwise unquali-

Id. Tit. 28.

fied, he might be apprised of it, and that they might bear testimony of the obligations which he contracted. Of the tenant, that they might testify the grant of the lord, and for what services it was made. Lastly, for their own advantage, that they might know who was the tenant, and what land he held.

Lib. Feud. 2.
Tit. 2.

Craig, Lib. 2.
Tit. 2. s. 4.

37. As it was frequently inconvenient for the lord to go to the lands intended to be granted, the improper investiture was introduced, which was a symbolical transfer of the lands, by the delivery of a staff, a sword, or a robe; which last being the most common method among the immediate vassals of kings and princes, gave rise to the word investiture. *Investitura quidem proprie dicitur possessio: abusivo autem modo dicitur investitura, quando hasta aut aliud corporum quidlibet porrigitur a domino, se investituram facere dicente. Quem si quidem ab illo fiat, qui alios habet vassallos, saltem coram duobus, ex illis solemniter fieri debet; alioque licet alii intersint testes, investitura minime valet.* Thus it appears that a proper investiture and possession were synonymous terms. Whenever, therefore, investiture was distinguished from possession, it was an improper one.

Craig, Lib. 2.
Tit. 2. s. 7.

38. The services which the vassal was bound to perform were declared by the lord at the time of the investiture, in the presence of the other vassals. But as a verbal declaration of the terms on which a feud was to be held might be forgotten or mistaken, it became usual for the tenant to procure a writing from the lord, containing the terms upon which the donation was made, witnessed by the other vassals, which was called a *breve testatum*. And where the lord could not conveniently come to the land, he delivered to the vassal a *breve testatum*, as an improper investiture; with a direction to some person to give him actual possession.

Oath of fe-
lity.

39. A *breve testatum* being a much better security than a verbal declaration, those who acquired feuds preferred the improper investiture, with a subsequent delivery of the possession, to a proper investiture: so that in process of time the feudal writers divided an improper investiture into three parts, — a *breve testatum*, a *præceptum seisinæ*, and a *possessionis traditio*.

40. Upon the creation of a feud, a connexion and union arose between the lord and his vassal, which was considered by the feudal writers as stronger than any natural tie whatever; and which the tenant was obliged to acknowledge by immediately

taking the oath of fidelity to the lord in these words:— *Ego N. (vassallus) super hæc sancta Dei evangelia juro quod ab hâc horâ usque ad ultimam vitæ meæ diem, tibi M. (Domino) meo fidelis ero contra omnem hominem, excepto rege vel priori domino meo.* Lib. Feud. 2. Tit. 7.

41. The idea of this oath appears to have been taken from the obligation which existed between the German princes and their *comites*. Thus Tacitus says, — *illum defendere, tueri, sua quoque fortia gloriæ ejus assignare præcipuum sacramentum est.* And fealty was so essentially requisite to the nature of a feud, whether a proper or an improper one, that it could not exist without it; for if lands were given without a reservation of fealty, the tenure was considered as allodial; but the oath of fealty might be dispensed with.

42. When feuds became hereditary, another ceremony was added, called *Homagium*, or *hominium*; which was performed in this manner:— The vassal being uncovered and ungirt, knelt down before his lord, and putting his hands within those of his lord, said, — *Devenio homo vester, de tenemento quod de vobis teneo, et tenere debeo, et fidem vobis portabo contra omnes gentes.* The lord then embraced the tenant, which completed the homage. Homage.

43. Fealty and homage have been often confounded by the feudal writers, but improperly. For fealty was a solemn oath made by the vassal of fidelity and attachment to his lord; whereas homage was merely an acknowledgment of tenure.

44. In consequence of the feudal connexion several duties arose, as well on part of the lord as of the vassal. With respect to those which the lord owed to his vassal, it was a maxim of the feudal law, that though the vassal only took the oath of fidelity, and did homage, and the lord, on account of his dignity, took none; yet was he equally obliged as if he had taken it, to do and forbear every thing with respect to the vassal, which the vassal was bound to do and forbear towards the lord; so that the duties of both were in most respects reciprocal. Duties of the lord and vassal.

45. As for the duties which the vassal owed to the lord, they are thus described in the *Liber Feudorum*, — *Qui domino suo fidelitatem jurat, ista sex in memoria semper habere debet. Incolume, tutum, honestum, utile, facile, possibile.* These were, however, all reduced to the two heads of Counsel and Aid. Under Counsel was included, not only giving faithful advice to the lord, but Wright, Ten. 13. Lib. 2. Tit. 6.

also keeping his secrets, and attending his courts, in order to enable him to distribute justice to the rest of his tenants.

46. Aid might either be in supporting the lord's reputation and dignity, or in defending his property. By aid to his person, the vassal was not only obliged to defend his lord against his private enemies, but also to assist him in his wars: and feuds were in general originally granted on condition of military service, to be done in the vassal's proper person, and at his own expense.

Feudal Aids.

Du Cange
Gloss. Voc.
Auxilium.

47. The Feudal Law did not originally oblige the tenant to contribute to the lord's private necessities; the first feudal aid being purely military. But in course of time the lords claimed and established a right to several other aids. The principal of which were, 1. To make the lord's eldest son a knight. 2. To marry the lord's eldest daughter. 3. To ransom the lord's person, when taken prisoner.

Estate of the
vassal.

48. Having stated the obligations of the lord and vassal to each other, I shall now proceed to enquire into the nature of the estate or interest which each of them had in the land. With respect to the estate of the vassal, we must recollect that as the original donations made by the French kings to their *fideles* and *leudes* were of a temporary nature, and as nothing more than the usufruct was given to them; so in the Feudal Law the *proprietas* was allowed to remain in the lord, and the vassal had only the *ususfructus* or *dominium utile*; that is, a right to take and enjoy the profits of the land, as long as he performed the services due to the lord.

Lib. Feud. I.
Tit. I.

49. As to the duration of feuds, they were originally precarious, and might be resumed at the lord's pleasure. They were next granted for one year, afterwards for life. In course of time it became unusual to reject the heir of the last tenant, if he was able to perform the services; and at length feuds became hereditary, and descended to the posterity of the vassal.

Was unalien-
able.

50. In the first ages of the Feudal Law, the vassal could not alien the feud without the consent of the lord; neither could he mortgage, or otherwise subject it to the payment of his debts.

Lib. 2. Tit. 55.

It appears however from the *Liber Feudorum* that feuds were frequently aliened: but by a constitution of the emperor Lotharius, reciting that the alienation of feuds had proved extremely detrimental to the military services which were due from the vas-

sals, they were absolutely prohibited from alienating their feuds without the consent of their lords, which was confirmed by a law of the emperor Frederic II.

51. The consent of the lord was seldom given without his receiving a present; from whence arose a general practice of paying the lord a sum of money for permission to alien a feud.

52. There was however a mode of disposing of part of a feud, which does not appear to have been comprehended in the constitutions of Lotharius or Frederic. This was by a grant from the vassal of a portion of his feud to a stranger, to be held of himself, by the same services as those which he owed to his lord.

Subinfeudation.

Lib. Feud. 2.
Tit. 34. s. 2.

53. This practice, which was called subinfeudation, became extremely common in France during the eleventh and twelfth centuries; but was prevented by an ordonnance of Philip Augustus in 1210, which directed that where any estate was dismembered from a feud, it should be held of the chief lord.

Hervé, Vol. 1.
101.

54. With respect to the estate or interest which the lord had in the lands, after he had granted them out as a feud, it consisted in the *proprietas*, together with a feudal *dominium* or seignory, and a right to fealty, and all the other services reserved upon the grant. And in case of failure in any of these the lord might enter upon, and take possession of the feud.

Estate of the lord.

55. As the feudatory could not alien the feud without the consent of the lord, so neither could the lord alien or transfer his seignory to another without the consent of his feudatory. *Ex eadem lege descendit quod dominus, sine voluntate vassalli, feudum alienare non potest.* For the obligations of the lord and vassal being mutual, the vassal was as much interested in the personal qualities of his lord, as the lord was in those of his vassal.

Wright 30.

Lib. Feud. 2.
Tit. 34. s. 1.

56. There was another obligation, on the part of the lord, of very considerable importance; namely, that in case the vassal was evicted out of the feud, the lord was obliged to give him another feud of equal extent, or else to pay him the value of that which he had lost.

His obligation on eviction.

Lib. Feud. 2.
Tit. 25. 30.

57. Sir Martin Wright doubts whether the obligation of the lord to protect and defend his vassal made him anciently liable on eviction, without any fraud or defect in him, to make a compensation for the loss of the feud; inasmuch as it could hardly be imagined that while feuds were precarious, and held at the

Ten. 38.

will of the lord by whom they were granted; while they were generously given without price, the lord should be subject to such a loss; and was of opinion that the lord's obligation to compensate the vassal, in case of eviction, only prevailed as to improper feuds, for which a price had been paid, or an equivalent stipulated.

58. Craig agreed in this respect with Sir Martin Wright. They, however, both acknowledge, that none of the ancient feudal writers make any such distinction; but that all admit the lord's obligation to compensate the vassal on eviction to have been general.

Descent of
feuds.

59. We have seen, that although feuds were originally granted at will only, yet in course of time they became descendible and hereditary. It will, therefore, be necessary to enquire into the rules of descent that were established by the feudal law, where no particular mode of descent was directed by the original grant: for in such case the maxim was, — *Tenor investituræ est inspiciendus*.

Craig, L. 1.
Tit. 10. s. 11.

60. The first rule was, that the descendants of the person to whom the feud was originally granted, and none others, should inherit; because, as the personal ability of the first acquirer to perform the military duties and services reserved was the motive of the donation, it could only be transmitted by him to his lineal descendants.

Lib. 2. Tit. 10.

61. In consequence of this rule the ascending line was, in all cases, excluded. Hence it is laid down in the *Liber Feudorum*, — *Successionis feudi talis est natura quod ascendentes non succedunt*.

Corvinus,
Lib. 2. Tit. 4.

And a modern feudist has said, — *Jus tamen feudale, ascendentium ordine neglecto, solos descendentes et collaterales admittit. Quoniam qui feudum accipit, sibi et liberis suis, non parentibus prospicit*. Whereas in allodial property the ascending line was capable of inheriting.

62. All the sons succeeded equally, as was the case in France, even respecting the succession to the crown, during the first and part of the second race. But the frequent wars occasioned by these partitions caused a regulation that kingdoms should be considered as impartible inheritances, and descend to the eldest son.

63. In imitation of the sovereignty, the same alteration was made in the descent of the great feuds; for by a constitution of the Emperor Frederic, honorary feuds became indivisible; and

they, as also the military feuds, began to descend to the eldest son, because he was sooner capable of performing the military service than any of his brothers.

64. Females were originally excluded from inheriting feuds, not only on account of their inability to perform the military services, but also lest they should carry the feud by marriage to strangers or enemies. Lib. Feud. 1.
Tit. 4.

65. The rule that none but the descendants of the first feudatory could inherit was so strictly adhered to, that in the case of a *feudum novum*, the brother of the first acquirer could not succeed to his brother, because he was not descended from the person who first acquired the feud. But in the case of a *feudum antiquum*, a brother, or other collateral relation, who was descended from the first acquirer, might inherit. Lib. Feud. 1.
Tit. 1. s. 2.

66. A mode was afterwards adopted of letting in the collateral relations of the first acquirer of a feud, by granting him a *feudum novum*, to be held *ut antiquum*, that is, with all the qualities of an ancient feud, derived from a remote ancestor; and then the collateral relations were admitted, however distant from the person who was last possessed of the feud. Craig, Lib. 1.
Tit. 10. s. 11.

67. To restrain this general right of inheritance in all the collateral relations, a new kind of feud was invented, called a *feudum talliatum*, which is thus described by Du Cange:—*Feudum talliatum dicitur, verbis forensibus, hæreditas in quamdam certitudinem limitata; seu feudum certis conditionibus concessum, verbi gratiâ, alicui et liberis ex legitimo matrimonio nascituris. Unde si is cui feudum datum est moriatur absque liberis, feudum ad donatorem redit. Talliare enim est in quamdam certitudinem ponere, vel ad quoddam certum hæreditamentum limitare.* Feudum Talliatum.

Gloss. voc.
Feudum.

Craig, Lib. 1.
Tit. 10. s. 17.

68. It is observable that the principles of the feudal descent were peculiar to that tenure, and differed entirely from those of succession established by the Roman law; in which the heir was a person instituted by the ancestor, or appointed by the law, to represent the ancestor in all his civil rights and obligations; whereas, in the feudal law, the heir succeeded not under any supposed representation to the ancestor, but as related to him in blood, and designated, in consequence of that relationship, by the terms of the investiture, to succeed to the feud.

69. When feuds became descendible, the lord, upon the death of every tenant, claimed the right of granting a new investiture Investiture
upon a descent.

to the successor, without which he could not enter into possession of the feud. This shewed that the right of inheriting was originally derived from the bounty and acquiescence of the lord ; and these investitures were evidence of the tenure, as well as of the services that were due for the feud.

Relief.

70. It was also customary for the lord to demand some present from the heir upon granting him investiture, which in course of time became part of the profits of the feud. It was called *Relevium*, and is thus described by a feudal writer : — *Relevium est præstatio hæredum, qui cum veteri jure feudali non poterant succedere in feudis, caducam et incertam hæreditatem relevabant ; solutâ summâ vel pecuniâ, vel aliarum rerum, pro diversitate feudorum.*

Scilt Cod.
s. 52.

Escheat.

71. As feuds were originally granted on condition of military or other services, it was deemed just that where there was no person capable of performing those services, the feud should return to the lord. Therefore, where a vassal died without heirs, the lord became entitled to the feud by escheat. Thus it is said in the *Liber Feudorum*,—*Si aliquis decesserit, nullo in feudo relicto hærede, jus feudi ad dominum pertinere dicimus.*

Lib. 2. Tit. 86.

Feudal Forfeitures.

72. Feuds having been at all times considered as voluntary donations, it was very soon established that every act of the vassal which was contrary to the connexion that subsisted between him and his lord, and to the fidelity he owed him, or by which he disabled himself from performing his services, should operate as a forfeiture of the feud.

Lib. 2. Tit.
23, 24.

73. In the *Liber Feudorum* there is a long letter from *Obertus de Orto* to his son, respecting feudal forfeitures, which he says were not reducible to any general principles. He then proceeds to state, that if the vassal omits to require an investiture from the heir of his lord, for a year and a day after the death of the lord, and to take the oath of fealty to him, he shall lose his feud. So in the case of the vassal's death, if his heir did not require investiture from the lord within that time, he shall forfeit his feud.

Lib. Feud. id.

74. If the vassal refused to perform the services which were reserved upon the investiture, he forfeited his feud. *Non est alia justior causa beneficii auferendi quam si id propter quod beneficium datum fuerit, hoc servitium facere recusaverit, quia beneficium amittit.*

75. If the vassal aliened the feud, or did any act by which its value was considerably diminished, he forfeited it. *Si vassallus feudum dissipaverit, aut insigni detrimento deterius fuerit, privabitur.* Zasius 61.

76. If the vassal denied that he held his feud of the lord, by saying that he held it of some other person, or denied that the land was held by a feudal tenure, he forfeited it. Craig, Lib. 3. Tit. 3. s. 1.

77. Every species of felony operated as a forfeiture of the feud; being the highest breach of the vassal's oath of fealty.

78. It has been stated that the feudal lord was equally bound to observe the terms of relation on his part: and, therefore, if he neglected to protect and defend his tenant, or did any thing that was prejudicial to him, or injurious to the feudal connexion, he forfeited his seigniory. Thus it is said in the *Liber Feudorum*,—*Si dominus commisit feloniam, per quam vassallus amitteret feudum, si eam commiserit in dominum; feudi proprietatem etiam dominus perdere debeat.* The lord might forfeit his seigniory. Lib. 2. Tit. 26. s. 47.

79. The feudal lord had not only a right to the service of his vassals in war, but had also the privilege of determining their disputes in time of peace. Thus we read in the *Liber Feudorum*,—*Si inter duos vassallos de feudo sit controversia, domini sit cognitio, et per eum controversia terminetur. Si vero inter dominum et vassallum lis oriatur, per pares curiæ, a domino sub fidelitate debito conjuratos terminetur.* Feudal Jurisdiction. Lib. 1. Tit. 18. 2—55.

80. The origin of the feudal jurisdiction is said to be derived from the following circumstances:—By the laws of all the northern nations every crime, not even excepting murder, was punished by a pecuniary fine called *fredum*. In the infancy of the northern governments the chief occupation of a judge consisted in ascertaining and levying those fines, which formed a considerable part of the public revenue. When extensive tracts of land were granted as feuds, the privilege of levying those fines was always included in the grant, with a right to hold a court for the purpose of ascertaining them; from whence followed a jurisdiction over the vassals, both in civil and criminal matters. Montesq. B. 30. c. 18. Hervé, Vol. I. 222—252. Robertson's Cha. V. Vol. I. 67, 365.

81. To all the nations descended from the Germans justice was originally administered in their general assemblies; nor did the king or chieftain pronounce sentence till he had consulted those persons who were of the same rank with the accused, without whose consent no judgment could be given. In imitation Hervé, Vol. I. s. 263.

Tit. 2, Lib. 2.
 Craig. s. 10.
 2 Comm. 54.

of this practice, every feudal lord had a court, in which he distributed justice to his vassals; and every freeman who held lands of him was bound, under pain of forfeiting his feud, to attend his court, there to assist his lord in determining all disputes arising between his vassals. And as all the tenants were of the same rank, and held of the same lord, they were called *pares curiæ*.

82. This practice appears to have been established so long ago as in the reign of the Emperor Conrad, A. D. 920. of whom there exists the following law : — *Statuimus ut nullus miles episcoporum, abbatium, &c. vel omnium qui beneficium de nostris publicis beneficiis, aut de ecclesiarum prædiis, &c. tenent, &c. sine certâ et convictâ culpâ, suum beneficium perdat, nisi, secundum consuetudinem antecessorum nostrorum, et judicium parium.*

CHAP. II.

*Ancient English Tenures.*SECT. 1. *Introduction of Feuds.*5. *Division of Tenures.*7. *Tenure in Capite.*13. *Statute of Quia Emptores.*14. *Tenure by Knight Service.*18. *Homage.*21. *Fealty.*23. *Fruits of Knight Service.*24. *Aids.*SECT. 27. *Reliefs.*29. *Primer Seisin.*31. *Wardships.*33. *Marriage.*35. *Fines for Alienation.*36. *Escheat.*37. *Tenure by Grand Serjeanty.*40. *Abolition of Military Tenures.*

SECTION I.

It is now universally admitted that the feudal system, with all its fruits and services, as established in Normandy, was first introduced into England by William the Conqueror in those possessions of the Saxon Thanes which were granted by him to his followers immediately after the battle of Hastings; and that about the twentieth year of his reign, the feudal system was formally and generally adopted here.

Introduction of feuds.

Spelman on Feuds.

Wright's Ten. 63.

2. In consequence of this event it became a fundamental maxim, or rather fiction of our law, that all the lands in the kingdom were originally granted out by our kings; and held mediately or immediately of the crown, in consideration of certain services to be rendered by the tenant. The thing holden was therefore called a tenement, the possessors thereof tenants, and the manner of their possession, a tenure. And Lord Coke says, "In the law of England we have not properly *allodium*, that is, any subject's land that is not holden."

1 Inst. 65. a.

Id. 1. b.

3. Although feuds were not originally hereditary in those countries where the feudal law was first established, yet we find that feuds were from the beginning hereditary, where lands held by an allodial tenure were voluntarily converted into feuds. Thus Basnage in his *Commentary on the customs of Normandy*

Tom. I. 163. edit. 1778.

says that when Rollo became master of that province, he granted a considerable portion of it to his companions, and to gentlemen of Brittany, as hereditary feuds. That he also recalled a number of the ancient inhabitants who had held their estates by hereditary right, and restored them to their possessions in as full and ample a manner as they had held them under the kings of France.

4. When William I. established himself in England, he certainly granted to his followers the inheritance of all the estates which he distributed among them, for some of those estates are possessed by their descendants at this day. And when he persuaded the Anglo-Saxon proprietors to hold their lands by a feudal tenure, he as certainly allowed them to retain the inheritance.

Division of
tenures,
2 Com. 60.

5. Sir W. Blackstone states that there seem to have subsisted among our ancestors four principal species of lay tenures, to which all others might be reduced; the grand criteria of which were the natures of the several services or renders that were due to the lords from their tenants. The services, in respect of their quality, were either free or base; in respect of their quantity, and time of executing them, were either certain or uncertain. Free services were such as were not unbecoming the character of a soldier or a freeman to perform; as to serve under the lord in the wars, to pay a sum of money, and the like. Base services were such as were fit only for peasants, and persons of servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as to pay a stated annual rent, or to plough such a field for three days. The uncertain depended on unknown contingencies; as to do military service in person, or pay an assessment in lieu of it, when called upon, which are free services. Or to do whatever the lord should command, which is a base or villein service.

Idem.

6. From the various combinations of these services arose the four kinds of lay tenure which subsisted in England till the middle of the seventeenth century; and three of which subsist to this day. First, where the service was free, but uncertain, as military service, that tenure was called chivalry, *servitium*

militare, or knight service. Secondly, where the service was not only free, but also certain, as by fealty only, by rent and fealty, &c. that tenure was called *liberum socagium*, or free socage. These were the only free holdings or tenements; the others were villeinous or servile. As, thirdly, where the service was base in its nature, and uncertain, as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage, from the certainty of its services, but degraded by their baseness into the inferior title of *villanum socagium*, villein socage.

7. Although in the first instance all the lands in England were held immediately of the king, yet in consequence of the practice of subinfeudation, which prevailed in those times, the king's chief tenants granted out a considerable part of their estates to inferior persons, who were called *valvasores*, to hold of themselves, by which mesne or middle tenures were created; from whence arose several distinctions, as to the manner in which lands were held.

Tenure in capite.

8. Estates might be held of the king, or of a subject in two ways, either as of his person, or as of an honor or manor of which he was seised; and every holding of the person was, strictly speaking, a tenure in capite: but still that expression was always confined to a holding of the king in right of his crown and dignity; or, as it was formerly expressed, *ut de coronâ*, or *ut de personâ*; for whenever the holding was of the person of a subject, it was called tenure in gross.

1 Inst. 108. a.
12 Rep. 136.
Fitz. N. B.
3—5.

9. Tenure in capite was in general so inseparable from a holding of the person of the king, that if lands were granted by his majesty, without reserving any tenure, or *absque aliquo inde reddendo*, or the like; there the lands, by operation of law, should be held of the king in capite, because that tenure was the most advantageous to the crown.

Lowe's case,
9 Rep. 122.

10. Where an honor or barony originally created by the crown returned to the king by forfeiture or escheat; the persons who held their lands of such honor or barony became tenants to the crown, and were said to hold of the king *ut de honore de A.*, &c. This distinction of tenure was extremely important to those who

2 Inst. 64.

held of such honors or baronies; for by an article of the *Magna Charta* of King Henry III. it was declared that persons holding of honors escheated, and in the king's hands, should pay no more relief, nor perform more services to the king, than they should to the baron, if it were in his hands.

Fitz. N. B.

5. 8.

Dyer 44.

1 Inst. 108. a.

Stat. 1 Ed. 6.

c. 4.

11. It followed that where lands were held of the king, as of an honor, castle, or manor, escheated to the crown, the tenure was not *in capite*. And where lands were granted by the king to hold of him, as of his manor of A. this was not a tenure *in capite*.

Eastwick's
case, 12 Rep.
135.

12. Thus where lands were granted by King Philip and Queen Mary to Aringal Wade in fee, *tenendum de nobis et successoribus nostris ut de manerio nostro de East Greenwich in capite*; it was resolved that the lands were held of the crown, as of the manor of Greenwich, and not *in capite*.

Statute of
Quia Emptores.

2 Inst. 501.

13. In the case of private individuals, any person might formerly, by a grant of land, have created a tenure, as of his person, or as of any honour or manor whereof he was seized. If no tenure was reserved, the feoffee would hold of the feoffor, by the same services by which the feoffor held over. This doctrine having been found to be attended with several inconveniences, was altered in the reign of King Edward I. by the statute of *Quia Emptores Terrarum*, which directs that upon all sales or feoffments of lands, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it (a.) These provisions not extending to the king's tenants *in capite*, the like law respecting them was declared by the statutes of *Prærogativa Regis*, 17 Edw. 2. c. 6. and 34 Edw. 3. c. 15. by which last all subinfeudations previous to the reign of Edward I. were confirmed: but all subsequent to that period were left open to the king's prerogative.

Vide Tit. 32.
c. 1.

Tenure by
knight service.

1 Inst. 69. a.
Mad. Exch. 4to.
Vol. I. 321.

14. The first and most honourable kind of tenure was by knight's service, *servitium militare*. To make a tenure of this kind a determinate quantity of land was necessary, which was called a knight's fee, *feudum militare*, the measure of which is by some ancient writers, estimated at eight hundred acres of land, and by others at six hundred and eighty. But Lord Coke was of opinion, that a knight's fee was to be esteemed accord-

(a) The idea of this law was probably taken from the ordonnance of Philip Augustus, which has been mentioned in the preceding Chapter, s. 53.

ing to the quality, and not the quantity of the land : and that 20*l.* a year was the qualification of a knight.

15. Every person holding by knight service was obliged to attend the lord to the wars, if called upon, on horseback, armed as a knight, for forty days in every year, at his own expense. This attendance was his *redditus*, or return for the land he held. If he had only half a knight's fee, he was only bound to attend for twenty days, and so on in proportion. Mad. Id. 653.

16. The personal attendance in knight's service growing troublesome and inconvenient, the tenants found means of compounding for it; first, by sending others in their stead, afterwards by making a pecuniary satisfaction to their lords in lieu of it. At last this pecuniary satisfaction was levied by assessments, at so much for every knight's fee; from whence it acquired the name of *scutagium*, or *servitium scuti*; *scutum* being then a well known name for money, and in our Norman French it was called *escuage*. Mad. Exch. 652.

17. As *escuage* differed from knight service in nothing but as a compensation differs from actual service, it is frequently confounded with it. Thus Littleton must be understood when he says that tenant by homage, fealty, and *escuage*, was tenant by knight service. S. 95.

18. Tenure by knight service had all the marks of a strict and regular feud. It was granted by words of pure donation — *dedi et concessi* : was transferred by investiture, or delivering corporal possession of the land, and was perfected by homage and fealty. Thus every person holding a feud by this tenure was bound to do homage to his lord, for which purpose he was to kneel down before him, and say, “ I become your man from this day forward of life and limb, and of earthly worship; and unto you shall be true and faithful, and bear you faith for the tenements that I claim to hold of you; saving the faith that I owe unto our sovereign lord the king.” And the lord being seated, kissed him. Homage.

Lit. s. 85.
Stat. 17 Ed. 2.

19. Homage was properly incident to knight service, because it concerned service in war. It must have been done in person, not by attorney; and the performance of it, where it was due, materially concerned both the lord and the tenant in point of interest and advantage. To the lord it was of consequence, because till he had received homage of the heir, he was not

1 Inst. 66. b.
67 b. n. 1.
2 Inst. 10.

entitled to the wardship of his person or estate. To the tenant the homage was equally important; for anciently every kind of homage, when received, bound the lord to acquittal and warranty; that is, to keep the tenant free from distress, entry, or other molestation, for services due to the lord paramount; and to defend his title to the land against all strangers.

Lib. 9. c. 4,

20. The words *homagium* and *dominium* are directly opposed to each other, as expressing the respective situations and duties of the lord and vassal; which, in conformity to the principles of the feudal law, were with us reciprocal. Thus Glanville says,—*mutua quidem debet esse dominii et homagii fidelitatis connexio, ita quod quantum homo debet domino, ex homagio; tantum illi debet dominus, præter solam reverentiam.*

Fealty.

21. All tenants by knight service were also subject to fealty, which is thus described by Littleton, s. 91.—“And when a freeholder doth fealty, he shall hold his right hand upon a book, and shall say thus:—Know you this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do at the time assigned. So help me God and his saints.” And he shall kiss the book.

1 Inst. 68. a.
Wright, 55. n.

22. Fealty and homage were perfectly distinct from each other; for though fealty was an incident to homage, and ought always to have accompanied it, yet fealty might be by itself, being something done when homage would have been improper; so that homage was inseparable from fealty, but fealty was not so from homage.

Fruits of
Knight Service.

23. The tenure by knight service, being the most honourable, was also the most favourable to the lord, for it drew after it these five fruits or consequences, as inseparably incident to it; namely, aids, relief, primer seisin, wardship, and marriage.

Aids.

24. With respect to aids, they were the same as those established on the continent; namely, to make the lord's eldest son a knight, to marry the lord's eldest daughter, and to ransom the lord's person when taken prisoner. These aids were introduced into England from Normandy, where they appear to have been established before the Conquest; and are thus described in the *Grand Coustumier*, c. 35.—*Tria autem sunt capitalia auxilia*

Normanniæ. Primum videlicet ad primogenitum filium domini sui in ordinem militiæ promovendum. Secundum videlicet ad primogenitam filiam domini maritandam. Tertium videlicet ad corpus domini sui de prisonâ redimendum, cum captus fuerit.

25. Aids of this kind were originally uncertain ; besides which the tyranny of the feudal lords induced them to demand other aids, such as to pay their debts, and to enable them to pay their reliefs to their superior lords. To prevent this it was provided by King John's *Magna Charta*, c. 12. That no aids, except the three above-mentioned, should be taken by the king, without the consent of parliament ; nor in any case by inferior lords.

By the statute of Westm. I. c. 36. the aids of inferior lords were fixed at twenty shillings for every knight's fee, for making the lord's eldest son a knight, or marrying his eldest daughter. The same was done with regard to the king's tenants *in capite*, by the statute 25 Edw. 3. c. 11. As to the aid for the ransom of the lord's person, not being capable of any certainty, it was never ascertained.

27. Upon the death of every tenant the lord claimed a sum of money from his heir, as a fine for taking up the estate that lapsed by the death of the ancestor, which was called a *relief*. This practice was also adopted from the laws of Normandy, where reliefs were reduced to a certainty at the time when the customs of that province were collected ; the relief of a fief d'Haubert being fifteen livres, and that of a barony a hundred.

28. It is said that reliefs were originally uncertain in England ; for in the laws of King Henry I. a declaration is contained that the king would be satisfied with a fair and just relief. When Glanville wrote, the relief for a knight's fee was fixed at a hundred shillings, which was supposed to be a fourth part of the annual value of the land. But the reliefs of barons and earl's fees were uncertain.

29. Where the king's tenant died seised, the crown was entitled to receive of the heir, if he were of full age, an additional sum of money, called *primer seisin*. It does not appear when this right was first established : but in the stat. of Marlbridge, 52 Hen. 3. c. 16. it is thus mentioned,—*De hæredibus autem qui de domino rege tenent in capite, sic observandum est ; quod dominus primam inde habeat seisinam, sicut prius inde habere consuevit.* The

1 Ed. 1. c. 36.
2 Inst. 231.
13 Rep. 26.

Relief.

Grand Coust.
c. 34.

Wright 98,
2 Inst. 7.

Lib. 9. c. 4.
Litt. s. 112.

Vide Tit. 26.

Primer seisin.

2 Inst. 134.

king's right to primer seisin is also declared in the statute *De Prerogativa Regis*. And it was settled that the king should receive on this account one whole year's profit of the lands.

30. Primer seisin was only incident to the king's tenant in *capite*, not to those who held of inferior or *meane* lords. "It seems (says Sir W. Blackstone) to have been little more than an additional relief, founded on this principle, that by the ancient law of feuds, immediately upon the death of a vassal, the lord was entitled to enter, and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture; during which interval the lord was entitled to the profits."

Wardship. 31. These payments were only due where the heir was of full age. If the heir was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to wardship, (*b*) which consisted in having the custody of the body and lands of the heir, without being accountable for the profits, till the male heir attained twenty-one, and the female sixteen.

Grand Const. c. 33.
Basnage, vol. I. 326. 32. The doctrine of wardships was taken from the customs of Normandy, in which it was called *garde noble*. It is, however, observable, that this right was peculiar to that province, and did not prevail to the same extent in any other part of France, or in any other country where the feudal law was established.

Of the various hardships which arose from the adoption of the feudal law, wardship was the greatest, and of which there was most complaint: for the object of some of the first chapters of *Magna Charta* was, to regulate the conduct of the lords in this respect, and to restrain them from wasting and destroying the estates of their wards.

Marriage. Grand Const. c. 33. 33. By the customs of Normandy female wards were directed to be married with the advice and consent of the lord, and of their relations. In imitation of this practice, it appears to have been settled in England, soon after the establishment of the Normans, that the consent of the lord was necessary to the marriage of his female wards, for which the lords usually required a sum of money. In the charter of King Henry I. that monarch engages to waive that prerogative; this being disregarded, it was provided by the first draught of the *Magna Charta* of King

[(*b*) Writ of right of ward abolished after 1st June, 1835, by stat. 3 & 4 Will. 4. c. 27. s. 36.]

John, that heirs should be married without disparagement, by the advice of their relations. But in the charter of King Henry III. the clause is merely that heirs shall be married without disparagement.

34. Soon after, the king and the great lords established a right to consent to the marriage, not only of their female, but of their male wards: for as nothing but disparagement was restrained, they thought themselves at liberty to make all other advantages they could. Afterwards this right of selling the ward in marriage, or else receiving the price or sale of it, was expressly declared by the statute of Merton. 20 Hen. 3. c. 6.

35. All lands held by a feudal tenure were originally unalienable, without the licence of the lord; from whence arose fines for alienation, of which an account will be given hereafter. Tit. 32. c. 1.

36. Where the tenant died without heirs, by which there was no person to perform the services, the land returned to the lord as an escheat, in conformity to the rules of the feudal law. Escheat. Ante, c. 1. s. 71.

37. There was a species of tenure called *grand serjeanty*, which was considered superior to knight service; whereby the tenant was bound, instead of serving the king generally in his wars, to do him some special honorary service in person. Thus where the king gave lands to a man to hold of him by the service of being marshal of his host, or marshal of England, or high steward of England, or the like, these were grand serjeanties. So if lands were given to a man to hold by the service of carrying the king's sword at his coronation, or being his carver or butler, these were called services of honour, held by grand serjeanty. Tenure by grand serjeanty. Fleta. lib. 1. c. 10. 1 Inst. 106. a. 107. a. Dyer 285. b.

38. Lord Coke says this tenure has seven special properties. 1 Inst. 105. b.

1. To be holden of the king only.
2. The service to be done, when the tenant was able, in proper person.
3. The service was certain and particular.
4. The relief due in respect of this tenure was different from that due for knight service.
5. The service was in general to be done within the realm.
6. It was not subject to aid for making the eldest son a knight, or for marrying the eldest daughter.
7. It paid no escuage.

39. Madox, however, says, there were some serjeanties that paid escuage, but that peradventure these serjeanties were also holden by military tenure; for sometimes knight service was annexed to a serjeanty, that is, lands were holden both by serjeanty and by the service of a knight's fee. Exch. vol. 1. 650. 4to.

Abolition of
military tenures.

40. The oppressions arising from military tenures, having been discontinued during the civil wars in the reign of King Charles I. and in the time of the Commonwealth, were entirely removed at the Restoration, by the statute 12 Cha. II. c. 24. which enacted that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king, or others, be totally taken away ; that all fines for alienations, tenures by homage, knight service and escuage, and also aids for marrying the daughter, or knighting the son, and all tenures of the king *in capite*, be likewise taken away ; that all sorts of tenures held of the king or others be turned into free and common socage, save only tenures in frankalmoign, copyholds, and the honorary services of grand serjeanty ; and that all tenures which should be created by the king, his heirs or successors in future, should be in free and common socage.

Frank Tenement freehold.	{	1 Knight Service. --- Grand Serjeanty	{	1 Petit Serjeanty 2 Tenure in Burgage 3 Gavelkind.
Villanage	{	2 Socage	{	1 Free Socage 2 Villan Socage
Villanage	{	1 Free Villanage (Copyholds)	{	2 Privileged Villanage (ancient demesne (ant. freehold))

CHAP. III.

Modern English Tenures.

SECT. 1. Manors.

- 8. Courts Baron.
- 14. Inferior Manors.
- 17. How Manors are destroyed.
- 23. Tenure in Socage.
- 26. By Petit Serjeanty.
- 28. In Rurgage.
- 30. In Ancient Demesne.

SECT. 38. In Gavelkind.

- 39. Incidents to these Tenures.
- 48. Charges in Socage by stat.
12 Cha. II.
- 52. Tenure in Villanage.
- 53. Copyholds.
- 59. Free Copyholds.
- 62. Tenure in Frankalmoine.

SECTION I.

ALTHOUGH the statute 12 Cha. II. abolished the military and Manors. oppressive part of feudal tenures, yet the system itself was not set aside, and a new one introduced in its room; the effect of that statute was merely to reduce all tenures except frankalmoign, grand serjeanty, and copyhold, to one general species of tenure, then well known and subsisting, called free and common socage; of which it will therefore be necessary to give a full account. But as most of those persons of whom lands are now held in socage claim their feudal *dominium*, or seignory, in the character of lords of manors; and as all copyhold and customary estates are held of particular manors, it will first be necessary to enquire into the origin and nature of manors, and the rights of those by whom they are possessed.

2. The usual services reserved by the Conqueror and his sons on grants of large estates were those of a certain number of knights; and the grantees, in order to be able to perform those services, gave out, by subinfeudations, portions of their lands to their followers, to hold of themselves by military services. Where the reservation of those services was to the grantor and his heirs simply, he acquired a seignory in gross over such tenants: but where a person, having an extensive tract of land,

Fitz. N. B.
3 C. 8 A.

erected a castle or mansion upon it, to which he annexed a demesne for his own maintenance, and granted out the rest to inferor persons, to hold of him and his heirs, as of his castle or mansion, by certain services, the whole became a manor, of which the proprietor of the castle and demesne was lord.

Perk. s. 670.
 Plowd. 169.
 Bacon's Use of
 the Law.

3. Perkins, who wrote in the sixteenth century, gives the following account of the origin of manors: "And it is to know that the beginning of a manor was, when the king gave a thousand acres of land, or a greater or lesser part, unto one of his subjects and his heirs, to hold of him and his heirs, which tenure is knight service at the least, and the donee did perhaps build a mansion-house upon parcel of the same land; and of twenty acres, parcel of that which remained, or of a greater or lesser parcel, before the statute of *Quia Emptores*, &c. did enfeof a stranger, to hold of him and his heirs, as of the same mansion-house, to plow ten acres of arable land, parcel of that which remained in his possession; and did enfeof another of another parcel, &c. to carry his dung into the land, &c. And did enfeof another of another parcel thereof, &c. to go with him to war against the Scots, &c.; and so by continuance of time he made a manor (a).

Ante, c. II.

Gloss.

4. Manerium (says Spelman) *est feudum nobile, partim vassallis, quos tenentes vocamus, ob certa servitia concessum, partim domino in usum familiae suae; cum jurisdictione in vassallos, ob concessa praedia reservatum. Quae vassallis conceduntur, terras dicimus tenementales, quae domino reservantur, dominicales. Totum vero feudum dominium appellatur; olim baronia, unde curia quae huic praest jurisdictioni hodie Curia Baronis nomen retinet.*

5. It appears from the above passages, that the two material causes of a manor are demesnes and services. The demesnes comprise all that part of the land retained by the lord for his own use; and from which the other parts were dismembered. The freehold of these is vested in the lord, and they were formerly cultivated by his villeins for the maintenance of his family. The services were the returns due from the persons to

(a) It was holden by Meade and Windham, Justices of the C. B. in 22 Eliz. that a parsonage may be a manor. As if before the statute of *Quia Emptores Terrarum*, the parson, with the patron and ordinary, grant parcel of the glebe to divers persons, to hold of the parson by divers services. The same makes the parsonage a manor. Godb. Rep. 3.

whom the lord had granted the freehold of the rest of the lands, to hold of him as of his manor. These consisted of military and other duties, rents, fealty, and suit of Court; together with the usual profits arising from reliefs, fines for alienation, and other feudal incidents. (b)

The uncultivated part of the manor was called the lord's waste; which served for public roads, and common of pasture for the lord's cattle, as well as for those of his tenants.

6. There was another circumstance essentially necessary to a manor, namely, a jurisdiction over the tenants, which arose in the following way. It has been stated, that where lands were granted to a person as a feud, a jurisdiction over the inferior tenants and occupiers of them was always included. In conformity to this practice, it is probable that all the grants of land made by the Conqueror and his sons included a jurisdiction; for it appears from Dugdale's Monasticon, that in almost all the charters of lands granted by the crown to the abbies, a civil and criminal jurisdiction was expressly given. And we learn from all our ancient law books that since the Conquest every lord of a manor has exercised a jurisdiction over his tenants, and held a Court for that purpose; a franchise which must have been originally derived from the crown.

Anst. c. 1.
s. 79.

1 Inst. 58. a.
Heyw. 145.

7. Every estate of this kind had a chief seat or capital mansion upon it, as of which the lands granted out to the tenants were held; and being the residence of the lord, it was called in old French *manoir*, a *manendo*, from whence the whole acquired the name of manor. It is also called, and with more propriety, a lordship, being a feudal seignory or *dominium*, annexed to the possession of the demesnes, over the tenants holding lands by subinfeudation from the ancient proprietors of those demesnes, by certain services; with a jurisdiction over those persons. And Lord Coke says, "A manor in these days signifieth the jurisdiction and royalty incorporate, rather than the land or scite."

Copyh. s. 31.
Tanfield v.
Rogers, Tit. 28.

(b) In Calthorpe's Reading on Copyholds is the following passage: "A manor consisteth in two parts, viz. demesnes and services: and neither of these two parts hath the name of a manor, without the other. For as a messuage or lands cannot be called demesnes, without tenants thereunto belonging to pay rents and do services; so on the other part, though a man have tenants to pay him rents and do him service, and no messuage or lands whereupon to keep his Court, and to receive his rents and services, this cannot be called a manor, but only a seignory in gross."

Courts baron.
Copyh. s. 31.

8. The same writer, after stating that a manor consists of demesnes and services, proceeds thus:—"A word of another cause of a manor, which appeareth not in the definition so manifestly as the other causes do. This is a cause which among the logicians is termed *causa sine quâ non*; and that is a court baron: for indeed that is the chief prop and pillar of a manor, which no sooner faileth, but the manor falleth to the ground. If we labour to search out the antiquity of these courts baron, we shall find them as ancient as manors themselves. For when the ancient kings of this realm, who had all the lands in England in demesne, did confer great quantities of land upon some great personages, with liberty to parcel the land out to other inferior tenants, reserving such duties and services as they thought convenient, and to keep Courts, where they might redress misdemeanors within their precincts, punish offences committed by their tenants, and decide and debate controversies arising within their jurisdictions; these Courts were termed Courts Baron."

Leges Hen. I.
c. 55.
1 Inst. 58. b.
2 Inst. 31.

Bract. 154.
Gloss.

9. Formerly courts baron had in many instances both a civil and criminal jurisdiction. The civil jurisdiction was called *Socha et Sacha*; the criminal *Infangthefe et Outfangthefe*. These latter words are thus explained by Spelman:—*Significant latro-nem infra captum, hoc est, infra manerium vel jurisdictionem alicujus, jus habentis de eodem cognoscendi. Regale siquidem privilegium, et in antiquis diplomatibus, majoribus regni frequenter concessum, qui ipso hoc verbo talem assecuti sunt potestatem (c.)*

2 Inst. 31.

10. By the *Magna Charta* of King Henry III. c. 17. sheriffs of counties, constables of castles, escheators and coroners, were prohibited from holding pleas of the crown. Yet Lord Coke says, "Albeit the franchises of infangthefe and outfangthefe to be heard and determined within courts baron belonging to manors were within the said mischief; yet we find, but not without great inconvenience, that the same had continuance after this act. But either by this act, or *per desuetudinem*, for inconvenience, these franchises within manors are antiquated and gone."

4 Inst. 46. 268.
2 Inst. 104.

11. A court baron is still incident to every manor. It is composed of the steward and the freeholders, who hold their lands of the manor by fealty and suit of Court, and who are bound by

(c) It appears from the *Placita de Quo Warranto* during the reigns of the three first Edwards, which have been lately published by Government, that a very great number of lords of manors then had a civil and criminal jurisdiction.

their tenure to attend the court baron, and to assist the steward in the administration of justice.

12. This Court has the power of determining, by writ of right, all controversies relating to lands within the manor; and also to hold pleas of any personal actions of debt, trespass on the case, or the like, when the debt and damages do not amount to forty shillings. And in a late case it was determined that the steward of a court baron is a judicial officer; and that trespass would not lie against him, where his bailiff by mistake took the goods of B. under a precept commanding him to take in execution the goods of A.

4 Inst. c. 57.

Baldwin v. Tudge, 2 Wils. R. 20.

Holroyd v. Breare, 2 Barn. and Ald. 473.

13. Upon several avowries two of the questions were,— 1. Whether a court baron could be holden by the steward. 2. Whether two suitors or freeholders, at least, were not the necessary judges of that Court. After two arguments, Willes, C. J., Abney and Burnett, Justices, were of opinion, that the steward alone, without two freeholders at least, could not hold a court baron; and that the suitors are the judges, and not the steward.

Chetwode v. Crew, Willes R. 614.

14. The persons who held of the king's immediate tenants granted out portions of their lands to be held of themselves, and thereby created manors of an inferior kind, of which they were immediate lords, and the king's tenants lords paramount. Thus Bracton says, "*Poterit enim esse per se manerium capitale, et plura continere sub se maneria non capitalia, et plures villas, et plures hamletos, quasi sub uno capite et dominio uno.*" (d)

Inferior manors

212. a.

15. The practice of creating manors, or tenancies in gross, was effectually prevented by the statute *Quia Emptores*; in consequence of which all manors existing at this day must have been created before the 18 Edw. 1., for it is essential to a manor that there be tenants to hold of the lord; and no person, since that period could, upon the grant of an estate in fee simple, create a tenure of himself.

Ante, c. II. s. 13.

Co. Cop. s. 31. Wright, 160.

16. Lord Coke says, "the king himself cannot now create a manor."—"If the king at this day will grant a great quantity of land to any subject, enjoining him to certain duties and services, and withal willeth that this should bear the name of a manor, yet it will not be a manor in the estimation of the law."

Cop. s. 31.

17. As the material causes of a manor are demesnes and ser-

How manors are destroyed.

(d) Vide Mr. Astle's account of the Tenures, Customs, &c. of the Manor of Great Tey. Archæol. Vol. XII. p. 25.

vices, both of which are essential to its existence, because a manor must have a lord and vassals; it follows that whenever the demesnes are severed from the services, by the act of the party, the manor is destroyed.

6 Rep. 63.

18. Thus in Sir Moyle Finch's case, where a person seised of a manor levied a fine of all the demesnes to one and his heirs, who granted and rendered them to another for fifty years, and granted the reversion to the original owner in fee; it was resolved that the demesnes being once, by the act of the party, absolutely severed, in fee simple, from the services, the manor was destroyed. The alienation must however be of all the demesnes; for an alienation of part, or even of the principal mansion, will not have that effect.

Skin. R. 2.
5 Mod. 382.

19. Where the severance is by an act of law, the manor may be revived. Thus in Sir M. Finch's case it was agreed that if there were two coparceners, and on a partition the demesnes were allotted to one, and the services to the other; although there was an absolute severance, yet if one died without issue, and the demesnes descended to her who had the services, the manor was revived. Because on the partition they were in by act of law, and the demesnes were again united to the services by act of law.

6 Rep. 64. a.
15 Vin. Ab.
223.

20. Where a partition was made of a manor between two coparceners, and each had parcel of the demesnes, and parcel of the services, it was formerly held that as each of them was in by act of law, each had a manor. But in a modern case the Court of King's Bench was of opinion that a manor was an entire thing, and not severable.

5 Mod. 150.

Roll. Ab. Tit.
Manor F.

21. The extinction of the services also operates as a destruction of the manor. Thus where all the freehold estates held of a manor are purchased by the lord, or devolve to him by escheat, whereby the services become extinct, and there are no tenants left, the manor is for ever destroyed. For there cannot be a manor without a Court Baron; and no Court Baron can be without two suitors at least.

Willes R. 614.
3 Term. R.
447. 4 Id. 446.

Skin. 661.

22. In a case of this kind the proprietor of the demesnes retains a reputed manor, or manor in reputation: and continues to have a great number of the rights and franchises which were appendant to the manor. And where the services are not destroyed, but only separated from the demesnes, the person

Soane v. Ire-
land, 10 East.
259.

entitled to them has a seignory in gross ; for the tenants will then hold of him, as of his person, and not as of his manor. (e) Fitz. N. B. 3.

23. We now come to treat of tenure in free and common socage, which is thus described by Littleton, s. 117, 118.— Tenure in socage.

“ Tenure in socage is where the tenant holdeth of his lord the tenancy by certain service, for all manner of services, so that the service be not knight service. As where a man holdeth his land of his lord by fealty and certain rent for all manner of services ; or else where a man holdeth his land by homage, fealty, and certain rent for all manner of services ; or where a man holdeth his land by homage and fealty for all manner of services ; for homage by itself maketh not knight service. Also a man may hold of his lord by fealty only ; and such tenure is tenure in socage. For every tenure, which is not tenure in chivalrie, is a tenure in socage.”

24. Littleton derives the word socage from *soca*, a plough ; s. 119. the services anciently reserved on this tenure being those of husbandry. Somner deduces it from the Saxon word *soc*, importing liberty or privilege, which, being joined to a usual termination, is called *socagium*, or socage, signifying a free and privileged tenure. Sir Martin Wright admits Somner's etymology to be countenanced by Britton : but professes himself inclined to prefer Littleton's. 1. Because our division of tenures into knight service and socage, considering socage as a tenure *per servitium socæ*, directly answers to the Norman division of tenures into *fiefs d'haubert*, and *fiefs de roturier* ; that is, the gentleman's and the husbandman's fee. 2. Because in this sense the tenure in socage is, like that by knight service, simply denominated from the name or nature of the service anciently reserved upon it. Ten. 142.

25. As the grand criterion and distinguishing mark of socage tenure is, the having its renders and services ascertained ; it will include under it all other modes of holding free lands by certain and invariable rents and duties ; and, in particular, petit serjeanty, burgage, ancient demesne, and gavelkind.

26. Littleton says, s. 159.—“ Tenure by petit serjeanty is where a man holds his land of our Sovereign Lord the King, to yield to him yearly a bow, or a sword, or a dagger, or a knife, or By petit serjeanty.

(e) The rights and franchises annexed to manors will be treated of in Title 27.

a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an arrow, or divers arrows, or to yield such other small things belonging to war."

Id. s. 160. And such service is but socage in effect; because that such tenant, by his tenure, ought not to go, nor do any thing, in his proper person, touching the war; but to render and pay yearly certain things to the king, as a man ought to pay rent.

1 Inst. 108. b. 27. This tenure can only be of the king, the dignity of whose person gives it the name of *petit serjeanty*; for where lands are held of a subject by services of this kind, the tenure is nothing more than plain socage.

In burgage. 28. "Tenure in burgage (says Littleton, s. 162.) is where an ancient borough is, of which the king is lord; and they that have tenements within the borough hold of the king their tenements; that every tenant for his tenement ought to pay the king a certain rent, &c. and such tenure is but tenure in socage."

Lit. s. 163. "It is the same where any subject is lord of such burrough, and the tenants hold of him, to pay each of them an annual rent."

Id. s. 165, 6, 7. 29. The qualities of this tenure vary according to the particular customs of every borough, without prejudice to the feudal nature of it; in conformity to the maxim,—*consuetudo loci est observanda*.

2 Bl. Com. 83.
Rob. Gavel.
Appx. 390. [One of the most remarkable of these customs is Borough English, that the youngest son and not the eldest succeeds to the burgage tenement on the death of his father.]

In ancient demesne.
4 Inst. c. 58. 30. The first monarchs of the Norman line reserved a great number of estates throughout the kingdom for their own maintenance, of which they granted out portions to rustic persons, to hold of themselves, keeping a demesne in their own hands, by which the whole became a manor, whereof the crown was lord. The services reserved were to cultivate the demesnes, and to supply a certain quantity of provisions for the king's household, which was a species of socage tenure; and the lands thus held having been part of, and dismembered from, the ancient demesnes of the crown, the holders of them were called tenants in ancient demesne.

31. All those estates which are called in *Domesday Terra Regis* were manors of this kind; and where a doubt now arises whether a manor is of ancient demesne or not, it can only be determined by a reference to that record. Dyer 250, b.
2 Burr. 1046.

32. To the end that these tenants might the better apply themselves to their labours for the profit of the king, they had six privileges:—1. They could not be impleaded for their lands, &c. out of the manor. 2. They could not be impanelled to appear at Westminster or elsewhere, upon any inquest or trial. 3. They were free and quiet from all manner of tolls in fairs and markets, for all things concerning husbandry and sustenance. 4. And also of taxes and talliages by parliament, unless specially named. 5. And also of contribution to the expenses of the knights to parliament. 6. If severally distrained for other services, they might all join in a writ of *monstraverunt*. 4 Inst. 269.

33. These privileges only extended to the tenants in socage of manors of ancient demesne, not to those who held other parts of such manors by knight service; for the service of the plough and husbandry was the cause of them. And notwithstanding that in course of time most of these manors were granted by the crown to subjects; yet the socage tenants preserved their ancient privileges, and continued to be tenants in ancient demesne, though the services were commuted for money rents. Fitz. N. B. 13.
4 Inst. 270.

34. The tenure in ancient demesne is confined to lands held in socage of those manors, that were formerly in the possession of the crown, by the service of cultivating the demesnes of such manors, or by a render of provisions. The manor itself, and such other parts of it as were held by knight service, were not considered as ancient demesne, but as frank fee. It is, therefore, inaccurate to say that a manor is held in ancient demesne; the proper expression being, a manor of ancient demesne, in which the socage lands are held by that tenure. 1 Salk. 56.

35. Where a manor of this kind is in the hands of a subject, it is in the power of the lord and tenant to destroy the tenure. Thus, if the tenant be impleaded in any of the courts at Westminster, and the lord is a party to the suit, the lands will become frank fee; because the privilege of ancient demesne being Bro. Ab. Ant.
Dem. 32.
Fitz. N. B. 11.
2 Leon. 19.

established for the benefit of both the lord and tenant, they may, by their joint act, destroy it. (f)

2 Vin. Ab. 489. 36. If the lord enfeoffs another of the tenancy, this makes the land frank fee, because the services are extinguished. So
4 East. R. 290. if the lord releases to the tenant all his right in the lands; or if he confirms to him, to hold by certain services at the common law.

4 Inst. 270. 37. Whenever the manor of which the lands are held in
2 Leon. 191. ancient demesne is destroyed, that tenure is also destroyed; for there being no court left, the tenants must sue and be sued in the Courts at Westminster.

In Gavelkind. 38. The tenure in gavelkind, by which a great deal of land in Kent is still held, is a species of socage; the name being
Robinson's Gav. 3, 4. derived from the Saxon word *gavel*, which signifies rent, or a customary performance of husbandry works; from which the

[(f) One of the most familiar methods by which the tenure of ancient demesne has been destroyed, was the tenant's levying a fine or suffering a recovery of the lands in the Court of Common Pleas. By this proceeding the tenure was converted into frank fee or common socage, and until the lord restored the ancient tenure by bringing his writ of deceit, the fines and recoveries levied and suffered in the superior court were in force; so that while the lord's right to bring his writ continued, the title under the fine or recovery was insecure. But the above modes of destroying the tenure of ancient demesne have ceased since the statute 3 & 4 Will. 4. c. 74. which has abolished fines and recoveries, and which contains some important provisions for remedying the inconveniences above adverted to.

By the 4th section of the Act it is enacted, that no fine or recovery then levied or suffered, and not then reversed, or thereafter to be levied or suffered, of lands in ancient demesne in a superior court, shall, upon a writ of deceit, then or thereafter to be brought, be reversed as to any person except the lord, but shall be as valid against the parties thereto, and all persons claiming under them, as if not reversed as to the lord.

Sect. 5. enacts, that if at any time before the passing of the Act, a fine or recovery shall have been levied or suffered in a superior court, of lands in ancient demesne, and afterwards a fine or recovery shall be suffered in the lord's court (the fine or recovery in the superior court not having been previously reversed), then the fine or recovery subsequently suffered in the lord's court, shall be as valid as if the tenure had not been changed. And that in other cases fines and recoveries shall not be invalid although levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

Sect. 6. enacts, that the tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, shall be restored in cases wherein the rights of the lord of the manor shall have been recognized within twenty years, from the 1st of January, 1834.

Writs of deceit, are by virtue of the statute 3 & 4 Will. 4. c. 27. s. 36, 37. abolished after the 1st of June, 1835.]

land, subject to this kind of service, was called gavelkind. And Mr. Robinson concludes, from the etymology of this word, that gavelkind denotes the tenure of the land only; and that the partibility, and other customary qualities of the lands thus held, are extrinsic and accidental.

[The characteristic incidents of gavelkind tenure, are, that they descend upon all the sons equally as coparceners; in default of sons to daughters; and in default of lineal descendants, upon collaterals in like manner: that they do not escheat upon conviction or execution for felony; and that a minor of the age of fifteen years seised in fee in possession may by feoffment in person alienate absolutely: it should seem also that he may release a right not being in possession.]

Rob. on Gav.
112.

Ib. 288.

Ib. 248.
Ib. 279.

Ib. 258.
Ib. 274.

39. All the before mentioned tenures are evidently feudal, and derived from the same origin as tenure by knight service: for in both cases the lands are held of a superior lord, either the king, or of some private person. This feudal *dominium*, or seignory, as it is called, when vested in the king, may be either of his person, or as of some honor or manor which formerly devolved to the crown by forfeiture or escheat. When vested in a private person, it may be either in right of a manor, of which he is lord; or of his person, in which latter case it is a seignory in gross. But tenure of the person of a subject is now scarcely known. And where it no longer appears of whom lands are mediately held in socage, they shall be presumed to be held immediately of the king as the great and chief lord.

Incidents to
these tenures.

Ante, c. II.

Ante, s. 21.

Booth, Real
Act. 135.

40. All lands held by any kind of socage tenure are subject to a feudal return, render rent or service, of some sort or other to the lord of whom they are held, arising from a supposition of an original grant from the ancestor of the lord to that of the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate, and so continues to this day.

Ante, s. 1.

41. Although homage is taken away by the stat. 12 Cha. II. as properly incident to knight service; yet tenants in socage are still universally subject, over and above all other services, to the oath of fealty, or mutual bond of obligation between lord and tenant, without which no feud can subsist. Where the lands are held of a manor, fealty draws after it suit of court; and as

Lit. s. 131. 132.
1 Inst. 68. b.
n. 5.

Ante. c. II.

Wright 146. n.

all freehold lands are now held in socage, where no other service is reserved, fealty is due of course; and the lord may call upon the tenant to take the oath of fealty to him, in his court baron, which every lord ought to do, if it be only for the reason given by Littleton, s. 130. That when neglected it will by long continuance of time grow out of memory, whether the land be holden of the lord or not, by which he may lose his seignory, and all the profits that may accrue to him in consequence thereof.

42. It has been stated that the lord of a manor may release his tenants from their services, by which they will cease to hold of the manor, and will become tenants to the next immediate lord to whom they will owe fealty. A seignory in gross might also be released to the tenant, in which case he would hold of the next immediate lord, and still owe him fealty: for this duty could not be discharged or dispensed with, because it was the *vinculum commune*, or cement of the whole feudal policy.

Lit. s. 454.

Wright 146. n.

43. The tenure in socage was subject of common right to aids for knighting the lord's eldest son, and marrying his eldest daughter, which were fixed by the Statute of Westminster l. c. 36. at twenty shillings for every twenty pounds so held.

2 Inst. 231.

44. Tenants in socage were always subject to relief, which, however, was certain, consisting of one year's rent. The statute 28 Ed. 1. c. 1. declared, That a free sokeman should give no relief, but should double his rent after the death of his ancestor, according to that which he had used to pay his lord, and should not be grieved above measure.

45. Primer seisin was incident to the king's socage tenants *in capite*, as well as to those who held by knight service.

46. Wardship was also incident to tenure in socage: but quite different from that which was incident to knight service: for where lands in socage descended to an infant under the age of fourteen, his nearest relation, to whom the inheritance could not descend, should be his guardian, but responsible to him for the profits; nor was marriage, or the *valor maritagii*, any perquisite or advantage to the guardian, and the law remains unaltered in this respect.

47. Fines for alienation were also due for estates in socage. Lands held by this tenure always were, and still continue to be, subject to forfeiture for treason and felony; and also to escheat;

except those in gavelkind, which are not subject to escheat for felony, though they are to escheat for want of heirs.

48. The changes made by the statute 12 Cha. 2. in the tenure in socage are thus stated by Mr. Hargrave. 1. It takes away the aid *pour fille marier*, and *pour faire fitz chivalier*, which were incident to all socage tenures. 2. It relieves socage *in capite* from the burthen of the king's primer seisin, and of fines of alienation to the king, to both of which socage *in capite* was equally liable with tenure by knight's service *in capite*, though not so to wardships. 3. It extends the father's power of appointing guardians, by deed or will, which by the 4 & 5 Phil. and Mary was restricted to females, to children of both sexes.

Changes in
socage by stat.
12 Cha. 2.
1 Inst. 93. b.
n. 3.

49. In all other respects the tenure in socage remains as it was before statute 12 Cha. 2.; for by the fifth section of that statute it is provided that it shall not take away any rents certain, heriots, or suits of Court, belonging or incident to any former tenure taken away or altered by the act, or other services incident or belonging to this tenure, or the fealty and distresses incident thereunto; and that such relief shall be paid in respect of such rents as was paid in case of the death of a tenant in common socage.

50. Mr. Hargrave has observed that reliefs for lands, of which the tenure is converted into common socage, are saved in some instances by this statute. For the clause which preserves rents certain provides that such relief shall be paid, in respect of such rents, as was paid on the death of a tenant in socage; from which it seemed that there could be no relief out of lands, which the statute changed into socage, unless where a quit rent was also payable. And the reason of thus expressing the act would appear, by considering that a year's rent was the relief of lands holden by common socage; consequently, was never due out of lands which were not subject to a rent, unless by special custom or reservation.

1 Inst. 85, a.
n. 1.

51. The tenure by petit serjeanty is not named in the statute 12 Cha. 2. but still it has an operation on it; for it being necessarily a tenure *in capite*, though in effect only so in socage, livery and primer seisin were of course incident to it, on a descent; and these are expressly taken away from every species of tenure *in capite*. But in other respects petit serjeanty is the same as it was before. It continues in denomination, and still is, a dig-

1 Inst. 108. b.
n. 1.

nified branch of the tenure in socage, from which it only differs in name, on account of its reference to war.

Tenure in villenage.

207. a.

Wright 216.

52. It has been stated that the great division of tenures originally was into those that were free, and those that were base; or, as Bracton expresses it, into franktenement and villenage. *Tenementorum aliud liberum aliud villenagium*. The tenure in villenage arose in the following manner: under the Saxons there was a class of people in a condition of downright servitude, belonging, both they, their children and effects, to the lord of the soil. The Normans, who were strangers to any other than a feudal state, might probably enfranchise all such wretched persons who fell to their share, by admitting them to fealty, in respect to the little livings they had hitherto been allowed to possess; which they were still suffered to retain upon the like services, as they had formerly been bound to perform. But this possession, as now clothed with fealty, and by that means advanced into a tenure, differed materially from the ancient servile possession, and was thenceforth called villenage.

Lit. s. 132.

Copyholds.

53. When manors became established, the demesnes were cultivated by the lord's villeins, who were allowed to occupy some small parts of them, in order to provide for their subsistence. Their tenure was that of pure villenage, the services were base and uncertain; and as they might be dispossessed at any time, they were said to hold at the mere will of the lord.

Wright 220.

54. The acquiescence of lords of manors to their villeins holding the lands allotted to them as long as they performed their services, and in permitting their children to succeed them, advanced the pretensions of the villeins, in opposition to the absolute rights of the lords, so as to give them a kind of prescriptive or customary right to their possessions; which in course of time was taken notice of by the courts of justice; and under their sanction became at length a part of the common law.

55. As tenants of this sort had no other title to their estates but these customs, and admissions in pursuance of them entered on the rolls of the lord's court, or copies of such entries witnessed by the steward of the manor, they were called tenants by copy of court roll; and their interest a copyhold or customary estate.

Barr. Obs. on the stat.

56. The first mention of this tenure is in the *extenta manerii*, s. 9. made in 4 Edw. 1. which, though printed among the statutes, is only an instruction to the extender of the crown, with

regard to what he was to enquire into, and upon what heads and particulars he was to make his report. The words respecting copyholds are, "It is to be enquired also of customary tenants, that is to wit, how many there be, and how much land every of them holdeth; what works and customs he doth, and what the works and customs of every tenant be worth yearly; and how much rent of assise he paid yearly, beside the works and customs; and which of them may be taxed at the will of the lord, and which not."

57. There is, however, no mention of copyholds in the book of old tenures. Some cases appear respecting them in the reign of King Edward III., and the rights of copyholders to their lands were fully settled in the time of King Edward IV. 4 Rep. 21. b.

58. Copyholds are not affected by the stat. 12 Cha. 2. For it is provided by the seventh section of that act that it shall not alter or change any tenure by copy of court roll, or any services incident thereunto.

59. There is another species of copyhold, which was formerly called privileged villenage, or villein socage, of the origin of which Bracton gives the following account. Free copyholds.
Ante, c. II.
Lib. 1. c. 11.

There were at the time of the Conquest certain freemen who held their respective tenements freely, by free services, or by free customs; and being first ejected by the hand of power, they afterwards returned, and took their own tenements again, to be held in villenage, doing therefore services that were base and servile, but certain and expressed by name. These are called ascriptitious to the soil, and yet are freemen, though they perform villein services; since they perform them, not in respect of their persons, but in respect of their tenures. Black. Cons.
on Copyholders.

60. Tenants of this kind hold by copy of court roll; their admittances however are not, as in copyholds, to hold at the will of the lord, but to hold according to the custom of the manor; from whence they have been called free copyholders, or customary freeholders.

61. Sir W. Blackstone, in his Considerations on Copyholders, concludes with observing, that however the lawyers may, at times, have denominated these tenures a base species of freehold, in contradistinction to mere copyholds; yet the law in the main regards them as being properly copyhold, and not freehold tenures; else they would not have subsisted at this day; for Vide Tit. 10.
c. 1.

they must otherwise have been involved in the general fate of the rest of our ancient tenures, when by the stat. 12 Cha. 2. they were all abolished, and reduced to socage.

Tenure in
frankalmoign.

62. There remains but one more kind of tenure, which is of a spiritual nature, and called Frankalmoign, or free alms, whereby a religious corporation, aggregate or sole, may hold lands to them and their successors for ever. It is mentioned in the thirty-second chapter of the *Grand Coustumier* of Normandy, and was introduced into England by the Conqueror, and still continues, as the stat. 12 Cha. II. does not affect it.

Bract. lib. 2.
c. 10.

Lit. s. 135.

63. The services due for this tenure are purely spiritual; therefore the tenants are not bound to do fealty, because the service reserved is of a higher nature, and because the word frankalmoign excludes all temporal service.

1 Inst. 95. b.
100 b. n. (1).

s. 140.

Most of the ancient monasteries and religious houses held their lands by this tenure; and the parochial clergy, together with many ecclesiastical and charitable corporations, still hold their lands in the same manner. But Littleton says, that in consequence of the stat. *Quia Emptores*, none can give lands to be holden in frankalmoign, except the king.

TITLE I.

*Estate in Fee Simple.*SECT. 1. *Of Real Property.*

2. *Corporeal or Land.*
3. *Money to be laid out in Land.*
5. *Heir Looms and Charters.*
7. *Incorporeal.*
8. *Estates in Land.*
10. *Estates of Freehold.*
10. *Of Seisin.*
20. *Where an Entry is necessary.*
27. *Abatement.*
29. *Disseisin.*
32. *Abeyance of the Freehold.*
35. *Who may have Freehold Estates.*
39. *Estates in Fee Simple.*
43. *Abeyance of the Fee.*
45. *All other Estates merge in the Fee.*

SECT. 48. *Incidents to Estates in Fee Simple.*

49. *Alienable.*
51. *Descendible to Heirs General.*
52. *Subject to Curtesy and Dower.*
53. *Liable to Debts.*
60. *Of Crown Debts.*
63. *How contracted.*
68. *Bind the Lands when contracted.*
70. *Into whose Hands soever they pass.*
71. *How discharged.*
74. *Estates in Fee forfeited for Treason.*
80. *And for Disclaimer.*
81. *Qualified Fees.*

SECTION I.

By the law of England property is divided into two kinds; namely, Real and Personal Property, which are governed by distinct systems of jurisprudence. Real property consists of land, and of all rights and profits arising from and annexed to land, that are of a permanent and immoveable nature, and is usually comprehended under the words lands, tenements, and hereditaments. Land means the whole surface of the earth; tenement is a word of still greater extent, signifying every thing that may be holden by a tenure: but hereditament is the largest and most comprehensive word, including not only lands and tenements, but whatever may be inherited.

Of Real Property.

1 Inst. 6. a.

2. Real property is corporeal or incorporeal. Corporeal property consists wholly of substantial and permanent subjects, all which may be comprehended under the general denomination of

Corporeal, or Land.

- 1 Inst. 4. a. land ; which Lord Coke says, in its legal signification, comprehends any ground, soil, or earth whatsoever ; as meadows, pastures, woods, waters, marshes, furzes, and heath. It has also in
- Idem. its legal signification an indefinite extent, upwards as well as downwards ; for it is a maxim of law that *cujus est solum, ejus est usque ad cælum*. Therefore land legally includes all castles, houses, and other buildings standing thereon ; and downwards whatever is in a direct line between the surface and the centre of the earth ; such as mines of metals, coals, and all other fossils,
- Plowd. 313. which belong to the owner of the surface, except mines of gold and silver, for these by the royal prerogative belong to the crown.
- 2 Ves. jun. 652. 3. A share in the New River water is held to be real property ; as also a share in the navigation of the River Avon, and a share in some navigable canals.
- Money to be laid out in land. 4. Money agreed or directed to be laid out in the purchase of land is considered in equity as land ; because there whatever is agreed to be done is considered as actually done. Where money directed to be laid out in the purchase of land comes into the hands of the person who would have had the absolute property of the land, in case a purchase had been made, it will be considered as money. But where it is in the hands of a third person, some act must be done by the person entitled to it, to shew that he considers it as money, otherwise it will still be deemed land.
- Fonb. B. 1. c. 6. s. 9. 5. There are some chattels which are considered as so annexed, and necessary to the enjoyment of the inheritance, that they are deemed in law to be a part of it, and descendible to the heir, from whence they are called heir looms. Thus deer in a real authorized park, fishes in a pond, rabbits in a warren, and doves in a dove-house, are held to be part of the inheritance ; and belong to the heir, not to the executor.
- Walker v. Denne, 2 Ves. jun. 170. 6. It is the same of charters, court rolls, deeds and other evidences of the land, together with the chests and boxes in which they are contained. And where an ancient horn had immemorially gone with the estate, and had been delivered to the plaintiff's ancestors, to hold their land by it, it was decreed that it should go with the land as an heir loom.
- Biddulph v. Biddulph, 12 Ves. 161. 7. Incorporeal property consists of rights and profits arising from or annexed to land ; such as advowsons and rents, which are held to be of a real nature. Even offices exercisable within
- Heir Looms and Charters, 2 Comm. 427.
- 1 Rep. 1. Plowd. 323. —
- Pusey v. Pusey, 1 Vern. 273.
- Incorporeal.

certain places, though not annexed to land, are said to savour of the realty; and dignities or titles of honour, having been originally annexed to land are also considered as real property.

8. With respect to the nature and properties of the different estates which may be acquired in land, it is necessary to premise that an estate in land means such an interest as the tenant hath therein. It is called in Latin *status*, because it signifies the condition or circumstance in which the owner stands with regard to his property. To ascertain this with precision and accuracy, estates in land may be considered in a threefold view:—1. With regard to the quantity of interest which the tenant has in his tenement. 2. With regard to the time at which that quantity of interest is to be enjoyed. 3. With regard to the number and connexion of the tenants.

Estates in land.

1 Inst. 345. a.

2 Black. Com. 103.
Plowd. 555.

9. First, with regard to the quantity of interest which the tenant has in his tenement. This is measured by its duration and extent; and occasions the primary division of estates into such as are freehold, and such as are less than freehold.

10. An estate of freehold is an interest in lands, or other real property, held by a free tenure, for the life of the tenant, or that of some other person, or for some uncertain period. It is called *liberum tenementum*, frank tenement or freehold; and was formerly described to be such an estate as could only be created by livery of seisin, a ceremony similar to the investiture of the feudal law. But since the introduction of certain modern conveyances, by which an estate of freehold may be created without livery of seisin, this description is not sufficient.

Estates of Freehold.

Britton, c. 32.

1 Inst. 48. a.

11. There are two qualities essentially requisite to the existence of a freehold estate:—1. Immobility, that is, the subject matter must either be land, or some interest issuing out of or annexed to land. 2. A sufficient legal indeterminate duration; for if the utmost period of time to which an estate can last is fixed and determined, it is not an estate of freehold.

2 Comm. 386.

12. Thus if lands are conveyed to a man and his heirs for ever, or for the term of his natural life, or for the term of another's life, or until he is married, or goes to Rome, he has an estate of freehold: but if lands are limited to a man for five hundred years, or for ninety-nine years, if he shall so long live, he has not an estate of freehold. And the law was precisely the

1 Inst. 42. a.

297. a.

same when Bracton wrote. *Et sciendum quod liberum tenementum est id quod quis tenet sibi et hæredibus suis, item ut liberum tenementum, sicut ad vitam tantum, vel eodem modo ad tempus indeterminatum, absque aliâ certâ temporis præfinitione; sc. Donec quid fiat vel non fiat: ut si dicitur, Do tali donec ei providero. Liberum autem tenementum non potest dici alicujus quod quis tenet ad certum numerum annorum, mensium, vel dierum; licet ad terminum centum annorum, quæ excedit vitas hominum.*

Dissert. c. 2.
s. 5.

13. It has been shewn that upon the introduction of the feudal law all the lands in England became holden either by a free or a base tenure. The tenant who held by a free tenure had always a right to the enjoyment of the land for his life at least, and could not be dispossessed, even for the non-payment of his rent, or the non-performance of his services; whereas the tenant who held in villenage might be turned out at the pleasure of his lord; and his possession being perfectly precarious, was considered to be the possession of his lord, to whom he was in a great degree a mere slave.

Black. Cons.
on Cop.

207. a.

14. The person thus holding land by a free tenure was, therefore, called a freeholder, because he might maintain his possession against his lord, and for this reason *liberum tenementum* was opposed to villenage. Thus Bracton says,—*Item dicitur liberum tenementum ad differentiam ejus quod est villenagium, quia tenementorum aliud liberum, aliud villenagium*: for an estate of freehold once created could not cease without entry or claim. And the acquisition of an estate of this kind was attended with several valuable rights and privileges; the freeholder became a member of the county court, one of the *pares curiæ* in the court baron or lords' court, was entitled to be summoned on juries in the king's court, and to vote at the election of a knight of the shire.

1 Inst. 218. a.

Cop. s. 15.

15. In subsequent times the word freehold was in some cases applied to the estate or interest only of the tenant; as where a person had an estate for life in lands held in villenage, he was said to have a freehold interest. Thus Lord Coke says,—“A freehold is taken in a double sense; either it is named a freehold in respect of the state of the law, and so copyholders may be freeholders; for any that hath an estate for his life, or any greater estate in any land whatsoever, may in this sense be termed a

freeholder; or, in respect to the land, and so it is opposed to copyholders, that what land soever is not copyhold is freehold.

16. It is, however, fully proved by Sir W. Blackstone, in his *Considerations on Copyholders*, that no person can be considered as a freeholder, or entitled to the privileges of a freeholder, unless his estate consists of free land. So that although the determination of an estate be uncertain, yet if it is held by a base tenure, it is not considered in law as a freehold; nor has the tenant any of those privileges which the law gives to freeholders; for in that case he has a freehold interest only, whereas no estate is, strictly speaking, freehold, unless the possessor holds it by a free tenure; therefore all freehold estates must now be held in socage.

17. Lord Coke says, a freehold estate may at several times be moveable, sometimes in one person, and *alternis vicibus* in another; as if there be eighty acres of meadow, which have been used, time out of mind, to be divided between certain persons, and that a certain number of acres appertain to every of these persons, to be yearly assigned and allotted to them: they have freehold estates in their respective portions of the meadow.

1 Inst. 4. a.
Welden v.
Bridgewater,
Cro. Eliz. 421.

18. It is said in *Brooke's Ab.* That an upper chamber in a house is no frank tenement, as it cannot continue; for if the foundation fails, the chamber is gone. But Lord Coke states that a man may have an inheritance in an upper chamber though the lower buildings and soil be in another; and seeing it is an inheritance corporeal, it shall pass by livery.

Tit. Demand,
s. 20.

1 Inst. 48. b.

19. The possession of a feud was called seisin, which denoted the completion of the investiture by which the tenant was admitted to the land. Upon the introduction of the feudal law into England, the word seisin was only applied to the possession of an estate of freehold; in contradistinction to that precarious kind of possession by which tenants in villenage held their lands, which was considered to be the possession of their lords; in whom the freehold continued.

Of seisin.

Dissert. c. 1.

1 Inst. 153. a.
268 b.

1 Burr. R. 107.

1 Inst. 200. b
Plowd. 603.

20. Where a freehold estate is conveyed to a person by feoffment, with livery of seisin, or by any of those conveyances which derive their effect from the Statute of Uses, he acquires a seisin in deed, and a freehold in deed. But where a freehold estate devolved upon a person by act of law, as by descent,

Where an entry
is necessary.

1 Inst. 266. b.

See Tit. 39.
Descent. c. 3.

previously to the late statute, (3 & 4 Will. 4. c. 106.) he only acquired a seisin in law, that is, a right to the possession; and his estate was called a freehold in law; for he must have made an actual entry on the land to acquire a seisin, and a freehold in deed.

1 Inst. 245. b.
Plowd. 92.
6 Mod. 44.

21. The entry must have been made by the person having right, or some one authorized by him; for the mere act of going on the land would not amount to a legal entry, sufficient to vest the actual seisin in the person who had the right; but, in order to constitute a legal entry, the person must have entered with that intent, and done some act to shew such intention.

1 Inst. 15. a.
252. b.

22. The entry of the heir upon any part of the estate gave him a seisin in deed of all the lands lying in the same county: for, since the freehold in law was cast upon him by the death of his ancestor, and no person was in possession, so that no particular estate was to be defeated, a general entry into part was sufficient to reduce the whole into actual possession: but where lands lay in different counties, there must have been an entry in each county.

1 Inst. 250. a.
& b. 251.

23. If the heir was deterred from entering by bodily fear, he might make claim as near as he could. Such claim was, however, only in force for a year and a day: but if it was repeated once in the space of every year and day, which was called continual claim, (a) it had the same effect as a legal entry.

1 Inst. 15. a.
3 Wils. R. 521.
7 Term R. 390.
8 Term R. 213.
Tit. 8. c.

24. The entry of the heir was only necessary where the lands were in the actual occupation of the ancestor at the time of his death; for if the lands were held under a lease for years, and the lessee had entered under the lease, the heir was considered as having seisin in deed, before entry or receipt of rent, because the possession of the lessee for years was his possession. (b)

Goodtitle v.
Newman,
Tit. 29. c. 3.

25. The possession of a guardian in socage was also the possession of the ward. So that if a widow having a son, on whom her husband's estate descended, continued in possession after her husband's death, the law considered her as guardian in socage to her son; and therefore admitted the son, by that means, to have had a seisin in deed of the land.

1 Inst. 15. b.

26. Where lands are let on leases for lives, the freehold is in the lessees, consequently the heir has no immediate right of entry

[(a) This is now abolished. By stat. 3 & 4 Will. 4. c. 27. s. 11. it is enacted that no continual or other claim upon or near any land shall preserve any right of making an entry or distress or bringing an action.

(b) See s. 35 of the above statute.]

on the death of his ancestor. He is, however, entitled to the rent reserved on the lease, by the receipt of which he becomes seised of the rent, and also of the reversion expectant on the determination of the lease.

27. The seisin in law, which the heir acquires on the death of his ancestor, may be defeated by the entry of a stranger, claiming a right to the land, which entry is called an abatement; and in such a case the only mode of regaining the seisin is by an entry of the legal owner, which will restore him to the possession. If the abator dies seised, the lands will descend to his heir: and previously to the recent statute of limitations such descent tolled, or took away the entry (c) of the heir; who, in that case, was driven to his action.

Abatement.

1 Inst. 277. a.

Lit. s. 385.

Vide Tit. 29.

c. 1. Tit. 31.

c. 2.

28. Where a younger brother entered upon the death of his ancestor, such entry was not an abatement; for it should be intended that the younger brother did not set up a new title, but only entered to preserve the possession of the ancestor in the family, that no one else should abate. And if the younger son died in possession, still the elder son might enter; for the law would not intend the entry of the younger son to be a wrongful act, therefore his possession became that of the elder. (d)

Lit. s. 396.

Gilb. Ten. 28.

29. Where a person is in the actual seisin of an estate of freehold, he may lose that seisin by a stranger's entering on the estate, and forcibly ousting or dispossessing him of it; which is called a disseisin, and is thus defined by Littleton, s. 279., "Disseisin is properly where a man entereth into lands or tenements, where his entry is not congeable, and ousteth him which hath the freehold." Lord Coke, in his comment on this passage, observes, that every entry is not a disseisin, unless there is an ouster of the freehold; and it is said by Mr. Justice Fortescue in 8 Geo. I. that every disseisin is a trespass, but every trespass is not a disseisin. A disseisin is when one enters, intending to usurp the possession, and to oust another of the freehold. There-

Disseisin.

8 Mod. 55.

[(c) The law is now altered by stat. 3 & 4 Will. 4. c. 27. s. 39. which enacts, that no descent cast, discontinuance, or warranty, which may happen or be made after the 31st December, 1833, shall toll or defeat any right of entry or action for the recovery of land.

(d) By sect. 13 of the above act, it is enacted, that when a younger brother, or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.]

fore, *quærendum est a iudice quo animo* he entered. To make an entry a disseisin there must be an ouster of the freehold, either first by taking the profits, or secondly by claiming the inheritance.

30. There is scarcely a subject in the English law so obscure as that of disseisin. The full effect of disseisins must formerly have been not only a dispossessing of the freeholder, but also a substitution of the disseisor, as tenant to the lord; and as one of the *pares curiæ*, in the place of the disseisee. Now as the consent of the lord was formerly necessary to the admission of a new tenant into the feud, it is difficult to conceive how a complete disseisin could take place without the consent or connivance of the lord.

1 Burr. R. 110. 31. Lord Mansfield has therefore justly observed that “the precise definition of what constituted a disseisin, which made the disseissor the tenant to the demandant’s *præcipe*, though the right owner’s entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded; for after the assize of novel disseisin (e) was introduced, the Legislature by many acts of parliament, and the courts of law, by liberal constructions, in furtherance of justice, extended this remedy, for the sake of the owner, to every trespass or injury done to his real property, if by bringing his assize he thought fit to admit himself disseised.

Abeyance of the freehold.

1 Inst. 342. b.

32. Where there is no person *in esse* in whom the freehold is vested, it is said to be in abeyance, that is, in expectation, remembrance, and contemplation of the law. But it is a principle of the highest antiquity that there should always be a known and particular owner of every freehold estate, so that it should never, if possible, be in abeyance. This rule was established for two reasons:—1. That the superior lord might know on whom he was to call for the military services that were due for the feud; otherwise the defence of the realm would have been considerably weakened. 2. That every stranger who claimed a right to any particular lands might know against whom he ought to bring his *præcipe* for the recovery of them; as no real

[(e) The writ of novel disseisin is abolished by stat. 3 & 4 Will. 4. c. 27. s. 36. after the 1st of June, 1835.]

action could be brought against any person but the actual freeholder.

33. In consequence of this doctrine, it is a rule that a freehold estate cannot [by any conveyance operating at common law] be created to commence *in futuro*, except by way of remainder; because in that case the freehold would be in abeyance, from the execution of the conveyance to the moment when the estate created was to commence. [But by executory devise and conveyances operating by virtue of the statute of uses, freehold estates may be limited so as to commence *in futuro*; and in such cases the freehold does not continue in abeyance; for until the estates so limited take effect, in the case of devise it descends to the heir at law of the testator, and in that of a deed, results to or remains in the grantor.]

1 Inst. 217. a.
5 Rep. 94. b.

1 Lut. 795.
4 Taunt. 20.
Fearn. Rem.
351.

34. One of the few instances in which a freehold estate can be in abeyance is, where the parson of a church or other ecclesiastical person dies; for in that case the glebe, &c. is in abeyance, till a successor is appointed.

Lit. s. 647.

35. All natural persons born within the dominions of the crown of England are capable of holding freehold estates; unless they are attainted of treason or felony, or have incurred the penalties of a *præmunire*; for in those cases they are considered as civilly dead, and therefore incapable of possessing any real property.

Who may have
freehold estates.

36. Aliens, that is, persons born out of the dominions of the crown of England, except the children and grand-children of natural born subjects, are incapable of holding freehold estates for their own benefit; unless they are naturalized by act of parliament, or made denizens by the king's letters patent.

1 Inst. 2. b.
Tit. 29. c. 2.

37. Bodies corporate, whether sole or aggregate, ecclesiastical or lay, may hold those freehold estates that have been transmitted to them by their predecessors. They are however prohibited by several ancient and modern laws, usually called the statutes of mortmain, from purchasing more lands, without a licence from the crown. But the power of suspending statutes by regal authority only, being declared illegal at the Revolution, it was deemed prudent to give a parliamentary sanction to licences in mortmain. This was done by the statute 7 & 8 Wm. 3. c. 37. by which it was enacted that it should be lawful for the king, his heirs and successors, to grant to any person or persons, bodies politic or corporate, their heirs and successors, licences to

Tit. 32. c. 2.

1 Inst. 99. a.
n. 1.

Tit. 32. c. 2.

Co. Lit. 2. b.
Com. Dig. Tit.
Franchise F. 15.
17. Bl. Com.
479. Com. Dig.
Ib. F. (18.)
1 Sid. 162.
Plew. 538.

1 Inst. 99. a.
a. 1.

Estates in fee
simple.

Wright 149.

263. b.

alien in mortmain, and also to purchase, acquire, take, and hold in mortmain, in perpetuity or otherwise, any lands, tenements, rents, or hereditaments whatsoever. [So that although the capacity to purchase is at common law incident to lay corporations, yet it seems to be now settled that they must have a license from the Crown before they can exert that capacity to purchase. And having this capacity to take, it would seem that corporations, being absolutely entitled, have an incident power of alienation.]

38. It was formerly the practice, before a licence of mortmain was granted, to sue out a writ of *quod damnum*, in order to ascertain whether such a licence would be prejudicial to the king or others. But Mr. Hargrave says he was well informed that writs of this kind had not been usual on granting mortmain licences since the statute 7 & 8 Wm.

39. Estates of freehold are either estates of inheritance, or not of inheritance. The former are again divided into inheritances absolute, or fee simple; and inheritances limited; one species of which is called fee tail.

“Tenant in fee simple (says Littleton, s. 1.) is he which hath lands or tenements to hold to him and his heirs for ever. And it is called in Latin *feodum simplex*; for *feodum* is the same that inheritance is, and *simplex* is as much as to say lawful, or pure; and so *feodum simplex* signifies a lawful or pure inheritance.

40. Littleton has been censured for annexing an improper meaning to the word *feodum* in his definition; and it has been contended that that word signifies land holden of a superior lord by military or other services. But although this was certainly the original meaning of the word; yet when the feudal law was fully established here, and it was universally acknowledged that all the lands in England were held mediately or immediately of the crown, the word *feodum*, or fee, became generally used to denote the quantity of estate or interest in the land. Thus it appears from Bracton, that the word *feodum* was then often used in both these senses. *Et sciendum quod feodum est id quod quis tenet, ex quâcunque causâ, sibi et heredibus suis. Item dicitur feodum alio modo ejus qui alium feoffat, et quod quis tenet ab alio: ut si sit qui dicat, Talis tenet de me tot feoda per servitium militare.* And it is evidently for the purpose of denoting the quantity of interest, that the word *feodum* is used in pleading an inheritance in the king, viz. *Rex seisitus fuit in dominico suo ut de feodo*; where the word *feodum* cannot possibly import an estate holden,

the king not holding of any superior lord, but merely denotes an inheritance.

41. An estate in fee simple is the entire and absolute interest and property in the land; from which it follows that no one can have a greater estate. So that whenever a person grants an estate in fee simple, he cannot make any farther disposition of it, because he has already granted away the whole interest; consequently nothing remains in him. An estate in fee simple may, however, be granted on condition; and in devises by will, and deeds deriving their effect from the statute of uses, an estate in fee simple may be rendered defeasible on the happening of some future event.

42. Tenant in fee simple is the absolute master of all houses and other buildings erected on the land, as also of all timber growing thereon, for trees are considered as parcel of the inheritance; and the law does not favour the severance of them from the freehold, because they would be thereby wasted and destroyed. He is also entitled to all mines of metal, except gold and silver; and to dig up and dispose of all minerals and fossils which are under the land.

Ante, s. 3.
Lyddall v. Weston, 2 Atk. 19.

43. We have seen that the law requires the freehold should never, if possible, be in abeyance: but where there is a tenant of the freehold, the remainder or reversion in fee simple may exist for a time without any particular owner, in which case it is said to be in abeyance. Thus, if an estate be limited to A. for life, remainder to the right heirs of B., the fee simple is in abeyance (*f*) during the life of B., because it is a maxim of law that *nemo est hæres viventis*.

Abeyance of the fee.

1 Inst. 342. a.

44. The law, however, does not favour the abeyance of the fee simple, for in that case many operations are suspended. The particular tenant or person in possession of the freehold is rendered dispunishable, at law, for waste; for a writ of waste can only be brought by one entitled to the fee simple. The title, if attacked, could not formerly be completely defended; for there was no person in being whom the tenant of the freehold could pray in aid to support his right. Nor could the mere right itself if subsisting in a stranger, be recovered in this interval; for in a writ of right patent, a tenant for life could not join the mise on

Tit. 2. c. 2.

(*f*) That is the contingent remainder in fee is in expectation as Lord Coke expresses it, but the reversion in fee is not in abeyance but results to the grantor until the contingency.

themere right. And in modern times the Courts do not favour the abeyance of the fee simple, because it operates as a restraint on alienation.

All other estates
merge in the fee.

45. All inferior estates and interests in land are derived out of the fee simple ; therefore, whenever a particular estate, or limited interest in land, vests in the person who has the fee simple of the same land, such particular estate or limited interest becomes immediately drowned or merged in it, upon the principle that *omne majus continet in se minus.* (f)

2 P. Wms. 604.

46. Where a sum of money is charged upon a real estate, which estate comes to the person entitled to the money, if in fee, the charge is merged ; and where the money is secured by a term for years, or other legal estate, in a third person, there the charge is also merged, except where creditors are concerned ; or where the person becoming entitled to the charge is an infant, and dies during his minority, having by will disposed of the charge.

Donisthorpe v.
Porter, 2 Eden
162.
Vid. Tit.
39 Merger,
infra.

Thomas v.
Kemeys, 2
Vern. 348.
Colles' Cases in
Parliament,
112.
Powell v. Mor-
gan, 2 Vern. 90.
Chester v.
Willes, Amb.
246.
Donisthorpe v.
Porter 2 Ed.
162.

Incidents to
estates in fee
simple.

47. A term of five hundred years was vested in trustees to secure a daughter's portion, payable at eighteen, or marriage. The fee simple of the estate descended to the daughter, who afterwards died an infant, about eighteen ; having made a nuncupative will, which was good as to personal estate, whereby she devised all in her power to her mother. It was decreed by Lord Somers that this portion was not merged, but should go to the mother. And the decree was affirmed by the House of Lords.

48. The law has annexed to every estate and interest in lands, tenements, and hereditaments, certain peculiar incidents, rights, and privileges, which in general are so inseparably attached to those estates, that they cannot be restrained by any proviso or condition whatever.

Alienable.

49. Of the several incidents inseparably annexed to an estate in fee simple, the first is a power of alienation. Any general restriction, therefore of this power, annexed to the creation of an estate in fee simple, is absolutely void, and of no effect.

Doe v. Pearson,
Tit. 38. c. 9.

50. This unlimited power of alienation comprises in itself all inferior powers ; so that a tenant in fee simple may create any

(f) There is one exception to this rule in the case of estates tail. *Vide infra*, Tit. 2, c. 1 : [also in the instance of a base fee vesting in the person seized of the immediate reversion in fee ; for by the 39th section of the statute 3 & 4 Will. 4. c. 74., it is enacted that the base fee shall not merge but be enlarged to as large an estate as the tenant in tail could acquire by any disposition under the act.]

inferior estate or interest out of his own. Therefore a custom that a tenant in fee simple cannot demise his lands for more than six years is void, because it is contrary to the freedom of the estate of one who hath a fee simple. [If the tenant in fee simple does not alienate his estate during his life, he has the absolute power of testamentary disposition by a will duly executed according to the solemnities required by the statute of frauds. 29 Car. 2. c. 3.]

Salford's case,
Dyer 357. b.

Tit. 38. c. 5.
s. 1.

51. If the tenant in fee simple dies intestate, the] estate will descend to the heirs general of the person who was last seised thereof, whether male or female, lineal, or collateral. And it is for this reason that the word simple is added to the word fee, importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs; in contradistinction to another class of estates of inheritance, which are only descendible to some particular heirs, of which an account will be given in the next Title.

Descendible to
heirs general,
Tit. 29. c. 3.

52. Estates in fee simple [in possession] are subject to the curtesy of the husband and the dower of the wife, which will be noticed under those respective Titles.

Subject to
curtesy and
dower.

53. [Estates of which a person died seised in fee simple and which descended upon the heir, were at common law liable in the hands of the heir to the payment of all debts of the ancestor by specialty, but if he aliened before the action was brought the creditor was without remedy: and where the person so dying seised, was indebted by bond or other specialty, and devised the estate, the creditor had no remedy against the devisee. The statute of 3 & 4 Will. and Mary, c. 14. made perpetual by the 6 & 7 Will. 3. c. 14. gave the creditor "by bond or other specialty" a remedy against the heir and devisee jointly, and if the heir aliened before action brought he was liable to the amount of the value of the land: but the lands *bonâ fide* aliened by the heir before action brought, were not liable to the debts.

Liable to debts.
Davye v. Pepys,
Plowd. 439.
Buckley v.
Nightingale,
1 Stra. 665.

By the above act no remedy was given to the creditor against the devisee alone, if there were no heir; and it was held that the act only applied to specialties on which an action of *debt* lies, such as bond debts or covenants for the payment of sums certain, but not for damages for breaches of covenants or contracts under seal.

Wilson v.
Knubley, 7
East. 158.

54. The late act of 11 Geo. 4. and 1 Will. 4. c. 47. repeals the

above acts, and remedies the defects before mentioned, operating upon the wills made or to be made of all persons in being at the passing of the act, and upon all wills thereafter to be made by any person whomsoever. The act (section 2.) makes devises of real estate void as against the specialty creditors by bond, covenant, or otherwise; and by section 3. gives them a remedy by actions of debt or covenant against the heir and devisee, or the devisee of such first named devisee; and (section 4.) if there be no heir then against the devisee: section 6. makes the heir liable to the amount of the value of the lands if he alien before action brought. But lands *bonâ fide* aliened before such action are not liable to the debts in the hands of the purchaser: section 8. gives similar remedies against the devisee if he alien before action brought.

Gott v. Atkinson, Willes, 521. Miller v. Horton, Cooper, 45. Hughes v. Doublen, 2 Bro. C. C. 614. Bailey v. Ekins, 7 Ves. 319.

The 5th section protects from the operation of the act limitations and devises of real estate for the payment of debts, or portions for children in pursuance of marriage contracts *bonâ fide* made before marriage, and is nearly a re-enactment of the 3 Will. and Mary, c. 14. s. 4.

55. Until the recent statute 3 & 4 Will. 4. c. 104. estates in fee simple were not in general liable to the payment of simple contract debts; a doctrine not very consonant to natural justice. By the statute 1 & 2 Will. 4. c. 56. s. 22. 25. 26. in part repealing the 6 Geo. 4. c. 16. when a person is declared a bankrupt full power is given to the assignees (in whom the real and personal estate vests by operation of the act) to dispose of all his lands. The statute 3 & 4 Will. 4. c. 74. s. 55. 56. empowers the commissioners to dispose of the bankrupt's estates tail to a purchaser, and in part repeals the 6 Geo. 4. and 1 & 2 Will. 4. c. 56. *Vid. infra.* Tit. II. c. 2. s. 40—44.]

56. Formerly where a trader died before he was declared a bankrupt, his real estate was not liable to his simple contract debts. But by the statute 1 Will. 4. c. 47. s. 9. repealing 47 Geo. III. sess. 2. c. 74., it is enacted, "that when any person, being at the time of his death a trader within the bankrupt laws, shall die seised of, or entitled to, any real estate, which he shall not by his last will have charged with the payment of his debts; and which would have been assets for the payment of his debts due on any specialty, in which the heirs were bound; the

same shall be assets, to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty: provided that all creditors by specialty shall be paid the full amount of their debts before any creditors by simple contract, or by specialty, in which the heirs are not bound, shall be paid any part of their demands."

57. [And now by the recent statute 3 & 4 Will. 4. c. 104. freehold and copyhold estates in all cases are made assets for the payment of simple contract as well as specialty debts. By that statute it is enacted that after the passing of the act (29th August 1833) when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract, as on specialty; and that the heir at law, customary heir, or devisee of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir at law or devisee of any person who died seised of freehold estates was before the passing of the act liable to, in respect of such freehold estates at the suit of creditors by specialty, in which the heirs were bound: And it is provided that in the administration of assets by courts of equity, under the act, all creditors by specialty in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.] (g)

58. The personal estate is, however, the first and immediate fund for the payment of debts; and though a person charge his real estate, by his will, with the payment of his debts, yet that does not exempt the personal estate from being first applied for that purpose, unless the testator expressly exonerate it.

[(g) See as to the limitation of actions for debts of specialty, &c. statute 3 & 4 Will. 4. c. 42. s. 3.]

Ancaster v. Mayer,
1 Bro. R. 454.
Burton v. Knowlton, 3
Ves. J. 107.
Brummell v. Prothero, ib.
111.
1 Cox's R. 185.
Bootle v. Blundell, 1 Mer. 193.
19 Ves. 494.

Stephenson
v. Heathcote,
1 Eden 38.

59. Even a testamentary disposition of all the personal estate will not exempt it from being applied in payment of debts. For a court of equity will suppose the intention of the testator to have been, that only the residue of his personal estate, after payment of debts, should go to the legatees, unless a contrary intention evidently appears.

Of Crown
Debts.
2 Inst. 19.
Dyer 67. b.
Attorney Gene-
ral v. Resby,
Hard. R. 378.

60. By the common law the king was entitled to have execution of the body, goods and lands of his debtor, by virtue of his royal prerogative. By the eighth chapter of *Magna Charta* it was declared that the king's bailiffs should not seize any lands or rent for debt, as long as the goods and chattels of the debtor sufficed. *Nos vero nec ballivi nostri non seisiemus terram aliquam vel redditum, pro debito aliquo, quamdiu catalla debitoris presentia sufficiunt, et ipse debitor paratus sit satisfacere.* And Lord Coke observes that this was an Act of Grace, restraining the power which the king had before.

2 Inst. 19.

61. If the goods and chattels are not sufficient, his real estates become liable to the payment of all the debts due to the crown: for, where the debt is of record, or by specialty, the process is by writ of extent, returnable in the Court of Exchequer; by which the sheriff is directed to enquire, by the oaths of lawful men, what lands and tenements the debtor had at the time of the debt contracted. And if the debt arises on simple contract, the practice of the exchequer is, on affidavit of the debt, to direct a commission to enquire of it; and on inquisition returned, the debt is recorded, and an extent issues.

4 Term. R. 408.

Favel's case.
Dyer 160. a.
224. b.
An. Sav. 53.

62. Where the king's debtor dies, the crown may, notwithstanding, seize his lands and goods. It is said by Fanshawe, remembrancer of the queen that, after the death of any debtor to the crown, process shall issue against the executor, the heir, and the terre-tenants altogether. And in a modern case the Court of Exchequer said, that whenever an extent might have issued in a man's life-time, a writ of *diem clausit extremum* may issue against the estate of a simple contract creditor, where such debt was found by inquisition; though the person was not the king's debtor by record at the time of his death.

Rex v. Mitche-
ner, Bunb. 118.

How contracted.
Plowd. 321.

63. It is not necessary that there should be any contract with the king to make a person a crown debtor. For it was resolved in 2 Eliz. that if any money, goods, or chattels of the king come

to the hands of a subject, by matter of record, or by matter in *fact*, the land of such subject is charged therewith.

64. Sir Walter Mildmay had received annually out of the Exchequer, 50*l.* as a fee for his diet, for thirty years together; which was paid by the command of the lord treasurer, who had authority by privy seal to make allowance and payment of all fees and dues: but in truth this was not any fee. The question was, whether Sir Walter's executor should be charged with these sums so received. It was adjudged that he should be charged; for this payment, by the appointment of the lord treasurer, was not allowable, the privy seal not being an authority to dispose of the queen's treasure, unless where it was due. And he disposing of it otherwise was out of his authority; therefore the money so paid was a debt due to the crown.

Doddington's case, Cro. Eliz. 545.

65. The Earl of Devon being Master of the Ordnance, obtained of King James I. a privy seal, authorising him to take and sell broken and unserviceable iron ordnance, the same having theretofore been taken and enjoyed by the Masters of the Ordnance: by virtue of which the earl took several pieces of iron ordnance, and sold them for his own use. The question was, whether the earl's executors might be charged to the king for the conversion of the said ordnance.

Earl of Devon's case, 11 Rep. 89.

It was resolved that the privy seal, being made on a false suggestion, was void: therefore that the earl's executors were bound to account with the crown for the broken ordnance.

66. In a modern case it was held that land tax money in the hands of the collector was a crown debt.

Brassey v. Dawson, 2 Stra. 978.

67. It is said in Doddington's case, that the party receiving must know it to be the king's money; for if a person sells land to a receiver of the king, who pays him for it with the king's money, and the vendor is not privy to it, he shall not be answerable.

Ante, s. 63.

68. Lord Chief Baron Gilbert says, all debts due to the king are a lien on the lands of the debtor, from the time when they were contracted; for the debts that were of record always bound the lands of the debtor, and the specialty debts by the stat. 23 H. 8. c. 6. bind as a statute staple. Therefore, if a person becomes bound to the king in a bond, and process is issued on it, the writ warrants the sheriff to enquire of and seize the lands of the

Bind the lands when contracted. Gilb. Exch. c. 26.

Tit. 14 & 32. c. 8.

debtor, which he had on the day when the bond was executed. But if a bond be assigned to the king, the process shall not be to enquire of and seize the lands which the obligor had when he entered into the bond, but only the lands which the obligor had when the bond was assigned.

69. By the statute 13 Eliz. c. 4. s. 1. it is enacted, that all the lands, tenements, and hereditaments, which any treasurer or receiver of the courts of exchequer, or duchy of Lancaster, treasurer of the chamber, cofferer of the household, treasurer for the wars, or of the admiralty or navy, or the mint, receiver of any sums of money imprest, or otherwise, for the use of the queen, her heirs or successors, customer, collector, or farmer of the customs within any port of the realm, receiver general of the revenues of any county or counties, answerable in the receipt of the exchequer, or the duchy of Lancaster, hath, while he remains accountant, shall, for the payment of the queen, her heirs or successors, be liable and put in execution, in like manner as if the same treasurer, receiver, &c. had, the day he became first officer or accountant, stood bound by writing obligatory, having the effect of a statute staple, to her majesty, her heirs or successors, for payment of the same.

Into whose hands soever they pass.

2 Roll. Ab. 156. pl. 1.

Vide Tit. 32. c. 27.

How discharged.

Poole v. Shergold, 1 Cox. R. 160.

Vide Tit. 14.

70. Where lands are once liable to a crown debt, the lien continues, into whose hands soever they pass; even though conveyed by the debtor *bonâ fide* to a purchaser for valuable consideration. Thus it is said in Roll's Ab. That if a man becomes debtor to the king, being seised of land in fee, and after aliens the land, yet it may be put in execution; though the alienation was before any action commenced; for it relates to the time when he became indebted to the king, and after.

71. The only proper and legal discharge of a debt due to the crown is an acquittance from the officers of the exchequer, which is usually called a *quietus*, because it generally concluded with these words,—*abinde recessit quietus*. And by the stat. 27 Eliz. c. 3. it is enacted, That if an accountant or debtor to the crown obtains a *quietus* in his lifetime, his lands shall not be sold after his death.

72. [The stat. 1 and 2 Geo. 4. c. 121. sec. 10. provides, That when the estate of an accountant to the crown is sold under an extent or decree of the Courts of Chancery or Exchequer, and the purchaser pays his money into the Exchequer, from the

entry of such payment by the commissioners for auditing public accounts, the purchaser his heirs and assigns shall be wholly discharged from all further claims by the crown, although the money shall not be sufficient to discharge the whole debt. In this particular case the estate would be exonerated although the crown debtor should not obtain his *quietus*.

73. By the 9 Geo. 3. c. 16. called the *Nullum Tempus Act*, the crown is disabled from suing for the recovery of any lands, tenements, or hereditaments, where its right shall not have accrued within a period of sixty years next before. The recent statute of limitations 3 & 4 Will. 4. c. 27. does not appear to affect remedies of the crown against the crown debtor.] 11 East's Rep. 488.

74. Estates in fee simple are forfeited to the crown by attainder of treason; and the lands whereof a person so attainted dies seised in fee simple become vested in the crown, without any office; because they cannot descend on account of the corruption of blood of the person last seised; and the freehold shall not be in abeyance. Estates in fee forfeited for treason, &c.
2 Hawk. P. C. c. 4. s. 1.

75. This forfeiture relates backwards to the time when the crime was committed, so as to avoid all intermediate sales and incumbrances, but not those made before. 1 Inst. 390. b.

76. In cases of petty treason and felony, the estate is only forfeited to the crown for a year and a day, which was formerly called the *annum diem et vastum*. After that period, in consequence of the corruption of blood, it escheats [in the cases of petty treason and murder] to the lord of whom it is held. 1 Hale P. C. 360.
1 Salk. 85.
Tit. 30.

77. [By the stat. 54 Geo. 3. c. 145. no attainder for felony, save and except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same.”]

78. It would appear that this act leaves the offender the power of disposing of his estate in reversion expectant upon his decease.

Tit. 12. c. 2.
s. 25—28.

79. Trust estates in fee simple are forfeited to the crown for treason, but they do not escheat to the lord for felony.]

And for Dis-
claimer.
Dissert. c. 1.
s. 76.

80. An estate in fee simple is still so far considered as a strict feud, and the tenant thereof so far bound to perform the feudal duties and services, that if he disclaims upon record to hold his lands of his lord, it will operate as a forfeiture of his estate; and the lord may thereupon have a writ of right upon a disclaimer (*h*) for the recovery of the land. But if the lord accepts rent from the tenant after the disclaimer, he will be thereby barred of this writ.

1 Inst. 102. a.
Booth. R. Act.
133.
3 Leon. 271.

Qualified Fees.
1 Inst. 1 b.

81. "Of fee simple (says Lord Coke) it is commonly holden that there be three kinds, viz. fee simple absolute, fee simple conditional, and fee simple qualified, or a base fee. But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, viz. simple or absolute, conditional, and qualified or base: for this word *simple* properly excludeth both conditions and limitations that defeat or abridge the fee."

82. The nature of an estate in fee simple absolute has been already explained. But where an estate limited to a person and his heirs has a qualification annexed to it, by which it is provided that it must determine whenever that qualification is at an end, it is then called a qualified or base fee. As in the case of a grant to A. and his heirs, tenants of the manor of Dale, whenever the heirs of A. cease to be tenants of that manor, their estate determines.

1 Inst. 27. a.

Id. n. 6.

83. Lord Hale gives the following instance of a qualified or base fee. King Henry III. *dedit manerium de Penrith et Sourby Alexandro, regi Scotiæ, et hæredibus suis, regibus Scotiæ*. Alexander died, not leaving any heir king of Scotland, but only daughters; *et eâ de causâ*, King Edward I. recovered seisin, and the coheirs of Alexander were excluded. So where King Edward III. gave lands to the Black Prince, and to his heirs, kings of England, it was held that the grantee had a qualified fee; and having died in the lifetime of his father, so that his son did not then become king of England, the land reverted.

1 Rep. 137. b.

Wellington v.
Wellington,
1 Bla. Rep. 645.
S. C. 4. Bur.
2165. See also
Gibson v. Lord
Montfort, 1 Ves.
485.

84. In a modern case the Court of King's Bench certified to the chancellor that a devise to trustees and their heirs, upon trust to pay the testator's debts and legacies; and after payment

(*h*) [This writ abolished after the first of June, 1835, by stat. 3 & 4 Will. 4. c. 27. s. 36, 37, 38.]

thereof, to his sister for life, &c. gave a base fee to the trustees, determinable on payment of the debts and legacies.

85. Where a person holds his estate to him and his heirs, as long as A. B. has heirs of his body; this is a species of qualified or base fee; [it occurs where a tenant in tail, not being seised of the immediate reversion in fee, has levied a fine with proclamations to a stranger in fee: The issue under the entail are barred by the fine of their ancestor from claiming the estate; and the stranger has a fee so long as there are issue under the entail: by this process the character of the estate tail is changed and becomes a qualified or base fee determinable on failure of the issue under the entail: it was until the late act of 3 & 4 Will. 4. c. 74. s. 39. capable of merger by union with the ultimate reversion in fee, which, so long as it continued an estate tail, could not have taken place. Of this species of qualified or base fee a more particular account will be given in the next title.] 10 Rep. 97. b.

86. The proprietor of a qualified or base fee has the same rights and privileges over his estate, till the qualification upon which it is limited is at an end, as if he were tenant in fee simple. Plowd. 557.

With respect to conditional fees, they will be treated of in the next title.

TITLE II.
ESTATE TAIL.

CHAP. I.

Of the Origin and Nature of Estates Tail.

CHAP. II.

*Of the Power of Tenant in Tail over his Estate, and the Modes
of Barring it.*

CHAP. I.

Of the Origin and Nature of Estates Tail.

- SECT. 1. *Of Conditional Fees.*
 8. *Statute De Donis.*
 12. *Description of an Estate Tail.*
 13. *Tail General and Special.*
 14. *Tail Male and Female.*
 17. *Estates in Frank Marriage.*
 19. *Estates Tail are held of the
 Donor.*
 22. *How Created.*
 — 23. *What may be entailed.*

- SECT. 30. *Who may be Tenants in Tail.*
 31. *Incidents to Estates Tail.*
 32. *Power to commit Waste.*
 36. *Subject to Courtesy and Dower.*
 — 37. *But not to merger.*
 39. *Tenant in Tail entitled to the
 Deeds.*
 40. *Is not bound to pay off In-
 cumbrances.*

SECTION I.

Of conditional
fees.

DONATIONS of land were originally simple and pure, without any condition or modification annexed to them; and the estates created by such donations were held in fee simple. In course of time however it became customary to make donations of a more limited nature, by which the gift was restrained to some particular heirs of the donee, exclusive of others; as to the heirs of a man's body, by which only his lineal descendants were admitted,

in exclusion of collateral heirs; or to the heirs male of his body, in exclusion both of collateral heirs, and lineal female heirs.

2. Thus Bracton, in treating of donations, says—*Item sicut ampliari possunt hæredes, sicut prædictum est, ita coarctari poterunt per modum donationis, quod omnes hæredes generaliter ad successionem non vocantur. Modus enim legem dat donationi, et modus tenendus est contra jus commune, et contra legem, quia modus et conventio vincunt legem. Ut si dicatur—Do tali tantam terram cum pertinentiis in N. habendum et tenendum sibi et hæredibus suis, quos de carne suâ et uxore sibi desponsatâ procreatos habuerit. Vel sic—Do tali, et tali uxori suæ, vel cum tali filiâ meâ, &c. habendum et tenendum sibi et hæredibus suis, de carne talis uxoris, vel filia exeuntibus, vel procreatis vel procreandis: quo casu cum certi hæredes exprimuntur in donatione, videri poterit quod tantum sit descensus ad ipsos hæredes communes per modum in donatione appositum; omnibus aliis hæredibus suis a successione penitus exclusis, quia hoc voluit donator.*

Lib. 2. c. 6

Fleta, lib 3.
c. 9.
Britton, c. 36.

3. These limited donations were evidently derived from the *feudum talliatum*, of which an account has been already given, and were probably introduced into England about the end of the reign of King Henry II. or that of one of his sons; for Glanville, who gives a very minute account of the different estates in land that were known in his time, makes no mention of limited donations; whereas we have seen that Bracton who wrote in the reign of King Henry III. has given a full description of them.

Dissert. c. 1.
§ 67.

4. As the proprietors of estates held in fee simple had, at that period, acquired a power of alienation, there can be no doubt but that these limited donations were introduced for the purpose of restraining that right. But the general propensity which then prevailed to favour a liberty of alienation induced the courts of justice to construe limitations of this kind in a very liberal manner. Instead of declaring that these estates were descendible to those heirs only who were particularly described in the grant, according to the manifest intention of the donors, and the strict principles of the feudal law; (a) and that the donees should not,

(a) Jus feudale non solum talliis non adversari, sed maximè eis favere constat: non solum quod nullas fœminas ad successionem admittet, sed multo magis, quod tenorem successionis semper servandum jubeat; hæreditatemque secundum eam deferendam expressè jubeat.—*Craig, Lib. 2. Tit. 16. § 3.*

in any case, be enabled by their alienation to defeat the succession of those who were mentioned in the gift, or the donor's right of reverter; they had recourse to an ingenious device taken from the nature of a condition.

Tit. 13. c. 2.

5. Now it is a maxim of the common law that when a condition is once performed, it is thenceforth entirely gone; and the thing to which it was before annexed becomes absolute and wholly unconditional. The judges' reasoning upon this ground determined that these estates were conditional fees, that is, were granted to a man and the heirs of his body, upon condition that he had such heirs; therefore as soon as the donee of an estate of this kind had issue born, his estate became absolute by the performance of the condition; at least for these three purposes.

Plowd. 235.

241.

1 Inst. 19. a.

2—333.

7 Rep. 34. b.

1. To enable him to alien the land, and thereby to bar, not only his own issue, but also the donor, of his right of reverter.
2. To subject him to forfeit the estate for treason or felony; which till issue born he could not do, for any longer term than that of his own life; lest the right of inheritance of the issue, and that of reverter of the donor, might be thereby defeated.
3. To enable him to charge the lands with rents and other incumbrances, so as to bind his issue.

Plowd. 241.

6. The donee of a conditional fee might also alien the lands before issue had; nor could the donor have entered in such a case, because that would have been contrary to his own donation, which limited the lands to the donor and his issue. And if the donee had issue, born after the alienation, the donor was excluded during the existence of such issue. The issue were also bound by the alienation of their ancestor, though previous to their birth, because they could only claim in the character of his representatives; and were therefore barred by his acts. But where the donee of a conditional fee aliened before he had issue, such alienation did not bar the donor's right of reverter, whenever there happened a failure of issue; because the subsequent birth of issue was not a sufficient performance of the condition to render the precedent alienation valid.

7. Where the person to whom a conditional fee was granted had issue, and suffered it to descend to such issue, they might alien it; because having succeeded by descent to the estate of their ancestor, who had acquired a power of alienation by having issue, they took the estate in the same manner, discharged from

any restraint whatever. But if the issue did not alien, the donor 1 Inst. 19. a. would still be entitled to his right of reverter, as the estate would have continued subject to the limitations contained in the original donation.

8. From this mode of construing conditional fees, the purposes for which they were intended were completely frustrated; and therefore the nobility, in order to perpetuate their possessions in their own families, procured the statute of Westm. 2. 13 Edw. I. usually called the statute *De Donis Conditionalibus*, to be made; which after reciting the right of alienation assumed by the donees of conditional fees, enacts [“ That the will of the giver, according to the form in the deed of gift manifestly expressed should be observed, so that they to whom a tenement was so given under condition, should not have power to alien the same tenement, whereby it should not remain after the death of the donees, to their issue, or to the donor or his heir if issue failed.” (b)] Statute de Donis.

9. This statute, as Lord Mansfield has justly observed, only 1 Burr. 115. repeated what the law of tenures had said before, that the tenor of the grant should be observed; and therefore the judges, in the construction of it, held that where an estate was limited to a man and the heirs of his body, the donee should not in future have a conditional fee, but divided the estates, by creating a particular estate in the donee, called an estate tail subject to which the reversion in fee remained in the donor. Plowd. 248. 2 Inst. 335.

10. In consequence of this construction, estates thus limited Idem. are not conditional; nor is the right of entry of the donor, on failure of issue of the donee, considered as arising from a breach of the condition, but as a right of reverter, accruing to the donor on the natural expiration of the estate granted. The statute rejects the erroneous opinion which had been held by the judges, that a donation of this kind created a conditional fee; and declares that it vests an estate of inheritance in the donee, and some particular heirs of his, to whom it must descend, notwith-

(b) The words of the original are, “ *Dominus rex statuit quod voluntas donatoris, secundum formam in chartâ doni sui manifestè expressam, de cætero observetur, ita quod non habeant illi, quibus tenementum sic fuit datum sub conditione, potestatem alienandi tenementum sic datum, quo minus, ad exitum illorum quibus tenementum sic fuerit datum, remaneat post eorum obitum; vel ad donatorem, vel ad ejus heredem, si exitus deficiat, revertatur; per hoc quod nullus sit exitus omnino; vel si aliquis exitus fuerit, et per mortem deficiat, hærede de corpore hujusmodi exitus deficiente.*”

Plowd. 242.

standing any act of the ancestor : and that the estate of the donor is a reversion expectant on the determination of that estate.

1 Inst. 19. a.
392. b.

11. The statute *de donis* was made in the reign of a prince who, from the great number and excellence of his laws, has justly acquired the title of the English Justinian. It is therefore highly probable that he was induced by some motives unknown to modern times to give his assent to a law, which by allowing the nobility to entail their estates, made it impossible to diminish the property of the great families, and at the same time left them all means of increase and acquisition.

Description of
an estate tail.

12. An estate tail may be described to be an estate of inheritance, deriving its existence from the statute *De Donis Conditionalibus*; which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs general. It is called an estate tail, or a fee tail, from its similarity to the *feodum talliatum*, which appears to have been well known at that time; as it is mentioned in the forty-sixth chapter of this statute; where, in enumerating several kinds of estates, it is said—*ad terminum vite, vel annorum, vel per feodum talliatum.*" And note (says Littleton, s. 18.) That this word *talliare* is the same as to set to some certainty, or to limit to some certain inheritance. And for that it is limited and put in certain what issue shall inherit by force of such gifts, and how long the inheritance shall endure, it is called in Latin — "*Feodum talliatum, i. e. Hereditas in quamdam certitudinem limitata.*"

Tail general
and special.
Lit. s. 13. 15.

13. Tenant in tail is in two manners; tenant in tail general, and tenant in tail special. Where lands are given to a man and the heirs of his body, without any farther restriction, it is an estate in tail general; because, how often soever such donee in tail be married, his issue by every such marriage is capable of inheriting the estate tail. But if the gift is restrained to certain heirs of the donee's body, exclusive of others, as where lands are given to a man and the heirs of his body, on Mary his present wife to be begotten, it is an estate in tail special; and the issue of the donee by any other wife is excluded.

Tail male and
female.
Lit. s. 21, 22.

14. If lands are given to a person and the heirs male of his or her body, this is called an estate in tail male, to which the heirs female are not inheritable. On the other side, if lands are given to a person and the heirs female of his or her body, this is

called an estate in tail female, to which the heirs male are not inheritable. Mr. Hargrave says it is very unusual to create an estate in tail female; that he had seen an argument in which it had been attempted to prove that the law of England will not allow of a descent through females only, even in the case of estates tail, but that other authors, as well as Littleton and Coke, mention such descents; nor did he ever hear any authority cited to support the contrary doctrine. 1 Inst. 25. a. n.

15. In all instances of special entails, which limit the lands to one particular class of heirs, no descendant of the donee can make himself inheritable to such a gift, unless he can deduce his descent through that particular class of heirs, to which the succession of the land was limited. Therefore if lands be given to a man and the heirs male of his body, and he has issue a daughter, who has issue a son, this son can never inherit the estate; for being obliged to claim through the daughter, he must necessarily shew himself out of the words of the gift, which limited the lands to the heirs male only of the donee, which the daughter cannot be. Lit. s. 24.
Doe v. Hobson,
2 Black. R.
695.

16. For the same reason, if lands be given to a man and the heirs male of his body, remainder to him and the heirs female of his body; and the donee has issue a son, who has issue a daughter, who has issue a son; this son cannot inherit either of the estates, because he cannot deduce his descent wholly either through the male or the female line. 1 Inst. 25. b.

17. It was formerly a practice for a person to give lands to another, as a marriage portion with his daughter or cousin, to hold to the husband and wife in frank marriage; by which the lands became descendible to the issue of such marriage. Thus Glanville says — *Liberum dicitur maritagium quando aliquis liber homo aliquam partem terræ suæ dat cum aliquâ muliere, alicui in maritagium.* And Finch has observed that lands could not be given in frank marriage with a man that was cousin to the donor; but always with a woman. Estates in frank
marriage.
Lib. 7. c. 18.
B. 2. c. 3.

18. The judges had construed gifts in frank marriage in the same manner as donations to persons and the heirs of their bodies; by which means they were considered to be conditional fees, and consequently alienable after issue had. But this construction being evidently contrary to the intention of the persons who had created such estates, the statute *De Donis*, after re- 1 Inst. 21. a.

citing the case of a gift in frank marriage, comprises it in the remedial part of that law ; by which means gifts of this kind became estates in tail special, and the donees were restrained from alienating them.

Estates tail are held of the donor.
Dissert. c. 2. s. 13.

1 Inst. 23. a.
2 — 505.
Plowd. 237.

19. We have seen that in consequence of the statute *quia emptores*, where a person conveys away his whole estate, he cannot reserve any tenure to himself: but this statute only extends to those cases where the entire fee simple is transferred. Therefore where a tenant in fee simple grants an estate tail out of it, the tenant in tail will hold of the donor, and not of the chief lord.

2 Inst. 505.
2 Rep. 92. a.
Dyer, 362. b.

20. Where the donor of an estate tail grants over his reversion to a stranger, the donee of the estate tail will hold of such stranger. But if lands be given to A. in tail, with remainder in fee to a stranger, the donee of the estate tail will hold of the chief lord ; because the whole estate is conveyed away.

Infra, s. 38.

21. Where the tenant in tail has also the reversion in fee in himself, as he cannot hold of himself, it being a maxim in law that *nemo potest esse tenens et dominus*, he shall hold of the superior lord.

How created.

22. The statute *De Donis* speaks only of three modes of creating an estate tail ; namely, by a gift to a man and his wife and to the heirs of their bodies ; a gift in frank marriage, and a gift to a person and the heirs of his body issuing. Yet if lands be given to a person and his heirs, and if the donee dies without heirs of his body, that it shall remain to another, this shall be an estate tail, by the equity of the statute, though it be out of the words. For the makers of the act did not mean to enumerate all the forms of estates tail, but to put these examples ; so as all manner of estates tail general or special are within the purview of the act. For, as it is said by Hales Just. at common law, the interest of the donor was infringed and eluded, which was contrary to right and good conscience ; therefore the statute being made to restrain that vicious liberty of breaking such intents, which was suffered by the common law, shall be extended by equity.

2 Inst. 334.
Tit. 32. c. 21.
Plowd. 53.

Tit. 32. c. 21.

What may be entailed.

Tit. 1.

23. With respect to the kind of property on which the statute *De Donis* was meant to operate, the only word in the statute is *tenementum*, which has been shewn to signify every thing that may be holden, provided it be of a permanent nature ; so that

not only lands may be entailed, but also every species of incorporeal property of a real nature, as will be shewn hereafter.

24. Mr. Hargrave observes that two things seem essential to an entail within the statute *De Donis*. 1. That the subject be land, or something of a real nature. 2. That the estate in it be an estate of inheritance. It is not however necessary that the thing to be entailed should issue out of lands; for if it be annexed to lands, or in any wise concern lands, or relate to them it may be entailed. 1 Inst. 20. a. n.

25. Thus Lord Coke says, that estovers, common, or other profits whatsoever, granted out of land, may be entailed. So the office of sergeant of the Common Pleas, and the office of keeper of a church, may be entailed; as also the office of steward, receiver, or bailiff of a manor. 1 Inst. 20. a.
7 Rep. 33. b.

26. It has been stated that money directed to be laid out in the purchase of land is considered in equity as land. In such case, if the land to be purchased is directed to be conveyed to a person in tail, he will be considered in equity as tenant in tail of the money, till the purchase is made. Tit. 1. s. 4.
Infra, Ch. II. s. 65.

27. As to inheritances merely personal, which neither issue out of, nor relate to land, or some certain place, and which are not demandable *ut tenementa*, in a præcipe, they cannot be entailed within the statute *De Donis*. So that when things of this nature are limited to a person, and the heirs of his body, the donee takes a conditional fee; and may dispose of the property as soon as he has issue. 1 Inst. 20. a.

28. An annuity which only charges the person of the grantor, and not his lands, though it may be granted in fee cannot be entailed. In a modern case Lord Hardwicke held that an annuity in fee simple, granted by the crown out of the four and a half *per cent.* duties, payable for imports and exports at the island of Barbadoes, was merely a personal inheritance, not entailable within the statute *De Donis*; therefore that being settled upon A. and the heirs of his body, it was a conditional fee at common law; so that A. having issue might alien it, and thereby bar the possibility of reverter. Idem.
Stafford v. Buckley,
2 Ves. 170.
In *Aubin v. Daly*,
4 B. & Ald. 59,
this annuity was held to be personal estate, and to pass under a will attested by two witnesses only.

29. It was held by Lord Thurlow, in a modern case, that an annuity granted by act of parliament out of the revenues of the post-office, redeemable upon payment of a sum of money, to be laid out in land, was a personal inheritance only, not entailable Holderness v. Carmarthen,
1 Bro. R. 377.

within the statute *De Donis*; for that notwithstanding the power reserved to the crown of laying it out in land, the parties had a right to treat it as an annuity; and the Court of Chancery would not keep the objection, of its being land, in contemplation from century to century, because of the possibility of substituting the money in the place of the annuity.

Who may be
tenants in tail.
Willion v.
Berkeley,
Plowd. 227.
7 Rep. 32. a.

30. All natural persons capable of holding estates of inheritance in land, may be tenants in tail. And it was solemnly determined in 4 Eliz. that the king was within the statute *De Donis*, as well as a common person; because the statute was made to remedy the error which had crept into the law, that the donee had the power of alienating an estate given to him, and the heirs of his body, after issue had; and to restore the common law, in this point, to its right and just course; which it did, by restoring to the donor the observance of his intent. And when the statute *De Donis* ordained that the will of the donor should be observed, it made his will to be a law, as well against the king as against another.

Incidents to
estates tail.

31. Estates tail, like estates in fee simple, have certain incidents inseparably annexed to them, which cannot be restrained by any proviso or condition whatever.

Power to com-
mit waste.

Plowd. 259.
11 Rep. 50. a.

32. The first of these is, that as a tenant in tail has an estate of inheritance, he has a right to commit every kind of waste; by felling timber, pulling down houses, opening and working mines, &c. But this power must be exercised during the life of the tenant in tail, for at the instant of his death it ceases. If, therefore, a tenant in tail sells trees growing on the land, the vendee must cut them down during the life of the vendor, otherwise they will descend to the heir as parcel of the inheritance.

3 Leon. 121.

33. It is said by Clark, Justice, in 27 Eliz. that if a tenant in tail grants away all his estate, the grantee is punishable for waste. So if the grantee grants it over, his grantee is also punishable.

Cases temp.
Talbot, 16.
Mos. B. 224.

34. The Court of Chancery will not, in any case whatever, restrain a tenant in tail from committing waste. Thus Lord Talbot is reported to have said that in Mr. Saville's case, who being an infant, and tenant in tail in possession, in a very bad state of health, and not likely to live to full age; his guardian cut down a quantity of timber, just before his death. The remainder man applied for an injunction to restrain him, but could not prevail.

Att.-General v.
Duke of Marl-
borough,
3 Mad. 498.

35. A bond to restrain a tenant in tail from committing waste is void. Thus where a person settled lands on his daughter, and the heirs of her body; and took a bond from her not to commit waste; the bond was put in suit: but the Court held it to be an idle bond, and decreed it to be delivered up to be cancelled.

Jervis v. Bruton,
2 Vern. 251.

36. Estates tail are subject to the courtesy of the husband, and the dower of the wife, which are incidents inseparably annexed to them, as will be noticed under these titles.

Subject to
curtesy and
dower.

37. It has been stated that whenever a particular estate in land vests in the person who has the fee simple in the same land, such particular estate is immediately drowned or merged in it. In consequence of this principle, if an estate has been given before the statute *De Donis* to A., and the heirs of his body, if the fee simple was limited to A. by the same conveyance, or came to him afterwards, the estate tail would have become merged. But it was determined by the judges in the reign of Edward III. that an estate tail could not be merged, surrendered, or extinguished, by the accession of the greater estate. So that a man may have at the same time, and in his own right, both an estate tail, and the immediate reversion in fee simple, in the same land.

But not to
merger.
Tit. 1.

Plowd. 296.
2 Rep. 61. a.

The reason of this determination was, that the object of the statute *De Donis* being to render estates tail unalienable, if they were allowed to merge in the fee simple, an obvious mode of destroying them might have been adopted by the tenant in tail's purchasing the reversion.

39. Tenant in tail having an estate of inheritance has a right to all deeds and muniments belonging to the lands; which the Court of Chancery will order to be given up to him. (c)

Tenant in tail
entitled to the
deeds. *Papillon*
v. Voise, 2 P.
Ws. 471.

40. Tenant in tail having on-ly a particular estate, and not the entire property, he is not bound to pay off any charges or incumbrances affecting the estate. But where a tenant in tail does pay off an incumbrance charged on the fee simple, the presumption is that such payment was made in exoneration of the estate; because he may, if he pleases, acquire the absolute ownership. But the tenant in tail may by taking an assignment of the incumbrance to a trustee for himself, or by several other acts, charge the estate with the payment of such incumbrance.

Is not bound to
pay off incum-
brances.

Jones v. Mor-
gan, 1 Bro. R.
206.

Tit. 12. c. 3.
s. 12.

Kirkham v.
Smith,
Tit. 15. c. 4.

[(c) He who is entitled to the land has also a right to the title deeds affecting it. *Harrington v. Price*, 3 Barn. & Adol. 170.]

Shrewsbury v
Shrewsbury,
1 Ves. jan. 227.

41. The Earl of Shrewsbury being tenant in tail under an act of parliament, which restrained him from alienation, unless he conformed to the established religion, and being a Roman Catholic, paid off a sum of 15,000*l.* charged on the estate for his sisters' portions, without taking any assignment of the term by which that sum was secured, or any declaration of trust of it for himself. In 1751 Lord S. by deed, reciting that he was seised of the freehold, subject to this charge, that he had paid off the portion of one of his sisters, and part of the portion of another, and that as none of the portions had been raised under the terms, he had a right to have them raised for himself: he in consideration of 1000*l.* conveyed an advowson, being part of the premises comprised in the term, to one Robinson; the trustees consented, and were parties, upon condition that the consideration should go in discharge of the portions. Lord S. died in 1787, leaving a will: but without taking any notice of his right to be reimbursed this sum, or doing any other act by which his intention could be known.

A bill was brought by his personal representative against the next tenant in tail, and the trustees of the term, praying that they might be compelled to raise such sums as were paid by the late earl to his sisters.

15 Ves. 173.

Lord Thurlow said that, in the transaction of 1751 respecting the advowson, there was a perfect and distinct recognition that the circumstance of paying off the charge did make Lord S. a creditor; and decreed for the plaintiff.

Tit. 15. c. 4.

42. It was formerly held that a tenant in tail was not even bound to pay the interest of any incumbrances charged on the estate: but it has since been resolved, that in some cases he is bound to keep down the interest.

CHAP. II.

*Power of Tenant in Tail over his Estate, and Modes of Barring it.*SECT. 1 *Could only alien for his own Life.*4. *His Alienation not absolutely void.*6. *Sometimes a Discontinuance.*11. *Sometimes voidable by Entry.*14. *When it Creates a Base Fee.*17. *Cannot Limit an Estate to Commence after his Death.*20. *Exception.*24. *The Issue not bound by his Ancestor's Contracts.*31. *Unless he Confirms them.*SECT. 23. *Nor Subject to his Debts.*34. *Except Crown Debts.*39. *Tenants in Tail may make Leases.*40. *Are Subject to the Bankrupt Laws.*45. *And to Forfeiture for Treason.*51. *But not for Felony.*52. *Modes of Barring Estates Tail.*65. *And Money Entailed.*

SECTION I.

THE statute *De Donis* effecting a perpetuity restrained the tenant in tail from alienating his estate, by any mode whatever, for a greater interest than that of his own life. Thus Littleton says, s. 650, "If tenant in tail grants all his estate to another, the grantee has no estate but for term of life of the tenant in tail, and the reversion of the tail is not in the tenant in tail; because he has granted all his estate, and his right, &c."

Could only alien
for his own life.

2. It is however observable that the words of the statute *De Donis*, by which the alienation of an estate tail is prohibited, only extend to the original donee, and not to his issue—*nec habeant illi, quibus tenementum sic fuerit datum, potestatem alienandi*. But still the prohibition was extended by the judges to the issue *in infinitum*. And Broke says, the omission of the heirs of the donee in the statute, was a misprision of the clerk.

Plowd. 13.
T. Jones, 239.
Ab. Tit. Parl.
91.

3. Lord Goke, in his comment on this statute, says—"It was adjudged by Beresford that the issues in tail should not alien,

2 Inst. 336.

no more than they to whom the land was given, and that was the intent of the makers of the act; and it was but their negligence that it was omitted, as there it is said. In this case, by way of purchase, the land is given to the donees, and by way of limitation to the issues in tail; and therefore by a benign interpretation, the purview of this extends to the issues in tail."

His alienation
not absolutely
void.

4. Although the statute *De Donis* restrained tenants in tail from alienating their estates for any longer interest than that of their own lives: yet this must not be understood literally, that the grantee had only an estate for the life of the tenant in tail, which determined *ipso facto* by the death of the tenant in tail. All that was meant, was, that the grantee's estate was certain and indefeasible during the life of the tenant in tail only, upon whose death it became defeasible by his issue, or the remainder man or reversioner.

2 Ld. Raym.
779.

Walter v.
Bould,
Bulst. 32.

5. It was, however, otherwise, where anything was granted out of an estate that was entailed, as a rent, &c.; for such grant became absolutely void by the death of the grantor, and could never be made good.

Sometimes a
discontinuance.

6. The law considers the tenant in tail as having not only the possession, but also the right of possession and inheritance, in him; he has therefore been allowed to alienate them by certain modes of conveyance, so as to take away the entry of the issue, and drive him to his action, which is called a discontinuance. For — "seeing he had an estate of inheritance, the judges compared it to the case where a man was seised in right of his wife, or a bishop in right of his bishopric, or an abbot in right of his monastery."

Lit. s. 595.
2 Inst. 335.
1 — 325. a.

Co. Lit. 325.
a. b.
2 Burr. 704.

7. [Before the recent statutes of the 3 & 4 Will. 4. chapters 27 and 74. an estate tail might be discontinued by five different modes of conveyance, namely, by a feoffment, fine, release, confirmation, (the two latter accompanied with warranty) and by a recovery not duly suffered, as where there is no voucher over of tenant in tail, so as to bar the issue or remainders over. A recovery duly suffered has been sometimes termed a discontinuance, but from its peculiar operation it is an absolute conveyance by the tenant in tail.

8. No discontinuance, strictly speaking, could be effected by what was termed an innocent conveyance of the tenant in tail in

possession, such as lease and release, covenant to stand seised, or bargain and sale and grant.

9. The effect of a discontinuance was to pass a fee-simple under a new and wrongful title, and to divest the estates in remainder and reversion, taking away from the discontinuees their right of entry, and putting them to their right of action. And to work a discontinuance, the tenant in tail must be tenant in tail in possession.

10. But where the reversion and remainder could not be discontinued, the tenant in tail could not discontinue the estate tail[*]; as where the reversion or remainder was in the crown; for the king is a body politic, of all others most high and worthy, out of whose person no estate of inheritance or freehold can pass or be removed without matter of record.

11. A tenant in tail might also, before the late act to abolish fines and recoveries, (3 & 4 Will. 4. c. 74.) (d) alienate his estate by other modes of conveyance, which only transferred the possession, not the right of possession. These alienations by innocent assurances did not become *ipso facto* void by the death of the tenant in tail; but must have been avoided by the entry of the issue. Thus, if a tenant in tail exchanged his estate with a tenant in fee simple, it would be good, till avoided by the entry of the issue in tail.

12. But by the above stat. 3 & 4 Will. 4. c. 74. § 2. 14. fines, recoveries, and warranties of land, are abolished from the 31st December, 1833; and by the statute of limitations, ib. c. 27. s. 39. it is enacted, "That no discontinuance or warranty which may happen or be made after that day, shall defeat any right of entry or action for the recovery of land." It is conceived, therefore, that no discontinuance, according to its strict legal import, can be affected after the period specified in the above acts; for whatever may be the form of discontinuance, the above statute takes away its effect.

13. By the tenth section of the latter act it is enacted, "That a mere entry shall not be deemed possession within the meaning of the act."

[(d) This statute does not relate to Ireland except where expressly named, s. 92; and the reader's attention to this important exception is requested in reference to all the notices of the stat. 3 & 4 Will. 4. c. 74.]

Co. Lit. 327. b.
Lit. a. 599.
Doe v. Finch,
4 Bar. & Adol.
283.
Doe v. Jones,
1 Cr. & Jer.
528.
Drivers. Hussey
1 H. Bl. 269.
Doe v. Jones,
1 B. & Cr. 238.
243.
*Co. Lit. s. 625.
335. a.
Walsingham's
case. Plowd.
552. 562.
See also 3 & 4
Will. 4. c. 74.
s. 18.
Sometimes
avoidable by
entry.
Seymour's case.
Tit. 35, c. 12.
2 Ld. Raym.
779. 782.

7 T. R. 278.
1 Inst. 51. a.

Discontinuance
since 31st Dec.
1833, virtually
abolished.

c. 27. s. 39.

When alienation of tenant in tail creates a base fee.

14. Where before the act of 3 & 4 Will. 4. c. 74. the tenant in tail aliened the fee by any form of conveyance, other than a valid common recovery, his alienee had *prima facie* only an estate of inheritance, descendible to his heirs as long as the tenant in tail had issue inheritable under the entail, which was called a base or qualified fee. Where this alienation was by what was termed an innocent conveyance, the estate of the alienee, upon the death of the tenant in tail, could be avoided by the entry of the issue in tail: where the alienation was made by feoffment, without fine, or by fine without proclamations or recovery not duly suffered, the issue were put to their action in order to avoid the fine. Where, however, a fine was duly levied with proclamations by the tenant in tail, both the entry and action of the issue were taken away. Until this base fee was determined, it had all the incidents of an estate in fee simple.

Tit. 35. c. 9.

3 & 4 Will. 4.
c. 74. s. 1.

15. The expression base fee in the above act, means exclusively that estate in fee simple, into which an estate tail is converted where the issue in tail are barred; but the persons claiming estates in remainder are not barred.

Sutton v. Stone,
2 Atk. 101.

16. Before the late statute for abolishing fines and recoveries, where a tenant in tail made a conveyance in fee for a valuable consideration, the Court of Chancery would decree him to make a good title. Mr. Justice Wright is reported to have said that the Court would not point out what title the tenant in tail should make, but would decree him to make such title as he is capable of doing.]

Cannot limit an estate to commence after his death.

17. Where a tenant in tail [by a deed not in conformity with the 3 & 4 Will. 4. c. 74.] limits an estate to commence after his own death, it is absolutely void; and he continues to be tenant in tail as before; because there the issue in tail has a right paramount, *per formam doni*.

Beddingfield's case, Cro. Eliz. 896.
2 Rep. 52. a.

18. A tenant in tail covenanted to stand seised to the use of himself for life, after to the use of his eldest son, and his heirs. It was resolved that the son should not have the land by this covenant; for when the tenant in tail covenanted to stand seised to the use of himself for life, it was as much as he could lawfully do. The limitation over was void; and he was seised as before.

Bliethman's case,
Tit. 6. c. 3.

19. A tenant in tail covenanted, in consideration of natural love and affection, to stand seised to the use of himself for life, remainder to his eldest son in tail, &c. The question was, whether the tenant in tail had made any alteration in his estate by this covenant.

Machell v. Clarke,
2 Ld. Raym.
778.
7 Mod. 18.
11 — 19.
2 Eden. R. 357.

Lord Chief Justice Holt delivered the opinion of the court. He said it had been made a question if tenant in tail bargained and sold, or leased or released, or covenanted to stand seised of lands entailed, to another in fee, whether the estate conveyed determined by the death of the tenant in tail, or continued till the actual entry of the issue in tail. He held that such estate continued till the actual entry of the issue in tail, for these reasons,—1. Because tenant in tail had an estate of inheritance in him; and before the statute *De Donis*, it was held that such estate was a fee simple conditional. Then the statute made no alteration as to the tenant in tail himself, but only made provision that the issue in tail should not be disinherited by the alienation of his ancestor. By Coke Lit. 18. it appeared that a base fee might be created out of an estate tail; where it was said, that if a gift in tail was made to a villein, and the lord entered, he had a base fee. Then if a base fee might be created out of an estate tail, there was great reason that the bargainee, &c. of tenant in tail should have it. 2. The tenant in tail had the whole estate in him; therefore there was no reason why he could not divest himself of it, by grant, bargain, and sale, &c. since the power of disposition was incident to the property of every one. 3. It was no prejudice to the issue in tail, therefore no breach of the statute *De Donis*. Indeed there were strong words in the act for restraining alienations to the prejudice of the issue in tail, where it says, *Quod finis ipso jure sit nullus*, &c.; yet the construction of the said words had always been, that the entry of the issue was tolled by such fine, and he was driven to his formedon. Therefore if an act, which drove the issue in tail to his formedon would not be a breach of the statute, much less would it be a breach of the statute to drive the issue in tail to enter, to avoid a bargain and sale by his ancestor. As to authorities, Seymour's case was in point, where it was held that the bargainee of tenant in tail had a descendible estate. In 3 Co. Rep. 84 *b.* the case in Littleton, § 613. was put and considered; and there it

Vide Tit. 32.
c. 10 & 11.

10 Rep. 95.
Tit. 35. c. 12.

7 Mod. 26.

was held that the words ought not to be literally understood. Those of Littleton were, that if tenant in tail granted *totum statum suum* to I. S. and his heirs, and made him livery of seisin, yet his estate determined by the death of the tenant in tail. But this ought to be understood, that it was no discontinuance, but would drive the issue in tail to enter to avoid it. 4. That in this case the covenant to stand seised did not alter the estate tail, but it still continued. The reason was, that though the tenant in tail might make a conveyance of the estate in his lifetime, which should be good and binding, till avoided by the issue; yet any conveyance which he made to commence after his death, should be void; if by possibility it might not take effect during his life. The estate, by this covenant, was to commence from and after the death of the tenant in tail; and the instance put of a lease for years was apposite. If a tenant in tail made a lease for years not warranted by the statute 32 Hen. 8. to commence immediately, or which might possibly commence during his life, such lease was avoidable only by his issue, on his death; but if he made a lease to commence from and after his death, it was *ipso facto* void. Now this remainder was limited to commence from and after the death of the tenant in tail, therefore it was void; it might be said that here he covenanted to stand seised to the use of himself for life, the remainder over, so that the estate to arise upon the covenant to stand seised did arise in his own lifetime. To this it was answered, that the covenant to stand seised to the use of one's self was void, except for the sake of the remainder over; that the remainder, being to commence after his death, was void; and the covenant to stand seised to his own use could not be good, for the sake of a void thing.

What was the reason that such estate was void, when it was limited to commence after the death of tenant in tail? It was because it was to commence at a time when the right of the estate, out of which it would issue, was in another person by a title paramount to the conveyance, viz. *per formam doni*. A tenant in tail had an estate out of which he might carve other estates, provided he did it out of the estate in himself, so as to make it rightful in its creation, but otherwise not. For it would be injurious to make good a lease, or other estate, commencing

upon the right of another, whose title was paramount to the lease or estate so made. In the principal case the issue in tail had a title paramount, the title of the remainder, by virtue of the covenant, the very minute the remainder would take effect; that was the only true reason; therefore to make such an estate to take effect upon the possession of the issue, whose title was paramount, would be to make an estate take effect by wrong, the very minute it had its creation.

Adjudged that the remainder was void, and the estate tail not altered, by this covenant. Doe v. Rivers,
Tit. 5. c. 2.

20. It was however laid down in the preceding case, that an estate created by a tenant in tail, which must, or by possibility might, commence in the lifetime of the tenant in tail, was good. Exception.

21. Thus if a tenant in tail covenants to stand seised to the use of the covenantee for life, remainder to I. S. in fee, or to the use of I. S. for life, remainder to I. N. in fee; the remainder is good, till avoided by the entry of the issue in tail, although the tenant in tail dies before the remainder takes effect; because the estate for life takes effect immediately, and the remainder might by possibility have taken effect in the life of the tenant in tail. 2 Ld. Raym.
782. 7 Mod. 27.

22. So if tenant in tail releases to I. S. in fee, to the use of himself for life, remainder to I. N. in fee, after his death; this remainder is good, though it is to commence after the death of the tenant in tail; because it arises out of the estate of the releasee; which estate would have been good, till avoided by the entry of the issue in tail. Idem.

Doe v. Rivers,
Tit. 5. c. 2.

23. [Upon the preceding sections, 12 to 17 inclusive, it may be observed that under the late act for abolishing fines and recoveries, the tenant in tail may, by any species of deed duly enrolled and otherwise made in conformity with the act, absolutely dispose of the estate of which he is seised in tail, in the same manner as if he were absolutely seised in fee. If such assurance is not in conformity with the act, and not thereby abolished, it will of course be left to have all the operation it would have had before the act, so far as it is not thereby controlled.]

24. The issue in tail is not bound, either at law or in equity, to complete any contract or agreement made by his ancestor, The issue not
bound by his
ancestor's
contracts.

respecting the estate tail; because the issue claims *per formam doni*, from the person by whom the estate tail was originally granted, not from his immediate ancestor. (g)

3 Rep. 41. b.
1 P. Wms. 271.
2 Ves. 634.
Hill v Carr,
1 Cha. Ca. 294.
Cavendish
v. Worsley,
Hob. 203.
2 Vent. 350.

25. It was formerly held that a covenant by a tenant in tail to levy a fine, upon a valuable consideration, and a decree of the Court of Chancery that he should do so, would bind the issue in tail. This doctrine was, however, soon altered, and it was determined that a court of equity cannot dispense with any of those forms which the law requires to bar estates tail.

Jenkins v.
Keymes,
1 Lev. 237.

26. A tenant in tail made a mortgage, without levying a fine, with a covenant for further assurance, and died. Lord Keeper Bridgeman would not compel the issue to make the assurance good; though the father might have done it by fine or recovery.

Herbert v.
Tream,
2 Ab. Eq. 28.

27. A tenant in tail entered into articles, concerning his lands, for payment of his debts; but died without doing any act to destroy the estate tail. It was decreed that this agreement could not be executed against the heir in tail.

Sangon v.
Williams,
Gilb. R. 164.
Weale v.
Lower,
2 Vern. 306.
1 P. Wms. 720.

28. A decree was obtained against a tenant in tail, who had contracted for the sale of his estate, and received a great part of the consideration, to compel him to levy a fine, and suffer a recovery. The tenant in tail stood out all process against him, to a contempt and died. A bill was then brought against his issue to revive the decree against him, which was dismissed.

Wharton v.
Wharton,
2 Vern. 3.

29. A tenant in tail covenanted to settle a jointure on his wife. In order to perform his covenant, he acknowledged a fine, but died before it was perfected. The Court of Chancery refused to supply this defect against his issue.

Luttrell v.
Olmus,
Tit. 36. c. 11.

30. Where a person is prevented from barring an estate tail by force and management, the Court of Chancery will compel the parties to act as if the recovery had been suffered.

Unless he con-
firms them.

31. If the issue in tail does any act towards carrying the contract or agreement of his ancestor into execution, it will then become binding on him; and he will be compelled in equity to perform it.

Ross v. Ross,
1 Cha. Ca. 171.

32. Francis Ross having issue, James his legitimate son, and

[(g) By the stat. 3 & 4 Will. 4. c. 74. s. 40. it is provided that no disposition by a tenant in tail, resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity, under the act, notwithstanding such disposition shall be made or evidenced by deed.]

John a bastard, devised lands to John in tail. James having copyhold lands by descent, James and John agreed to exchange their estates. The agreement being executed James obtained a decree against John to levy a fine of his estate tail, and by that means to settle it on James. John died in contempt for not obeying the decree: his issue entered on the copyhold estate, and continued in the enjoyment of it; in consequence of which a bill was filed against him by James, to perform the agreement made by his father.

It was said by the Court, that if a tenant in tail agrees to convey, he is bound by that agreement: if he dies without performing it, his issue is not bound to perform it. But if the issue accepts of the agreement, and enters, as in this case, on the lands, it then becomes his own agreement, and will bind him. So decreed against the defendant.

33. The issue in tail is not subject to any of the debts or incumbrances of his ancestor. Therefore, if a tenant in tail acknowledges a statute or recognizance, upon which the land entailed is extended, the issue in tail may enter, upon the death of the ancestor, and oust the creditor.

Nor subject to his debts.

Bro. Ab. Tit. Recogn. pl. 7. Tit. 14.

34. Estates tail were not originally liable, in the hands of the issue, to the payment of debts due by the ancestor to the crown. But it is enacted by the statute 33 Hen. VIII. c. 39. s. 75, That all manors, lands, tenements, and hereditaments which shall come or be in the possession of any person or persons to whom the same shall descend, revert, or remain in fee simple, or in fee tail general or special, by, from, or after the death of any of his or their ancestors, whose heir he is; which said ancestor or ancestors was or shall be indebted to the king, or to any person or persons to his use, by judgment, recognizance, obligation, or any other specialty, the debt whereof shall not be paid; then and in such case the same manors, &c. shall be and stand charged and chargeable to and for the payment of the said debt.

Except crown debts.

35. Upon the construction of this act, it was resolved by the barons of the Exchequer in 41 Eliz. on conference had with Popham, Ch. J. and divers other justices, 1. That before this statute, if tenant in tail became indebted to the king by judgment, recognizance, obligation, or otherwise, and died, the king should not extend the land in the seisin of the issue in tail; for the king was bound by the statute *De Donis*; as it was adjudged

Anderson's case, 7 Rep. 21.

Ante, c. 1. s. 30.

Tit. 1. s. 68.

in Lord Berkeley's case. 2. That if the tenant in tail becomes indebted to the king, by the receipt of the king's money, or otherwise, unless it be by judgment, recognizance, obligation, or other specialty, and dies; the land in the seisin of the issue in tail shall not be extended for such debt of the king's. For this statute extends only to the said four cases; and all other debts remain at common law. 3. That if tenant in tail becomes indebted to the king by one of the four ways above mentioned in the said act, and dies; and, before any process or extent, the issue in tail, *bonâ fide*, aliens the land, it shall not be extended by force of the said act. For, as it appears by the words thereof, it makes the land, in the possession or seisin of the heir in tail only, liable against the issue in tail, and not the alienee. For the makers of the act had reason to favour the purchaser, farmer, &c. of the heir in tail, more than the heir himself; because they are strangers to the debts of the tenant in tail, and came to the land *bonâ fide*, on good consideration. 4. That a debt originally due to a subject, to which the king becomes entitled by attainder, forfeiture, gift of the party, or any other collateral way, was not within the statute; which only extended to debts originally due to the king, by judgment, recognizance, obligation, or other specialty.

36. Where a person takes an estate tail by gift from his ancestor, on good consideration, such estate is not liable to a debt of the ancestor, contracted after the gift was made.

Foskew's case,
2 Leon. 90.

37. Foskew being seised in fee of the manor of S. in consideration of his son's marriage, covenanted to levy a fine of the said manor to the use of himself and his wife for their lives, remainder to the use of his son and his wife, and the heirs of their bodies. A fine was levied accordingly. Foskew afterwards acknowledged a recognizance to Queen Elizabeth, and died indebted to the crown. The manor of S. was extended for the queen's debt.

It was argued by Coke, that the manor was not chargeable by the stat. 33 Hen. VIII. For the object of that statute was to make lands entailed liable to the king's debts, where they were not so before, against the issue. But the words "was or shall be indebted" should not be intended after the gift made. That, "shall be," was to be intended of future debts, after the statute; whereas, at the time of the settlement, Foskew was not receiver or other officer to the queen. That this was not within the

statute; for the words were, by gift of his ancestors. Here the son had not the manor by gift of his father, but rather by the statute of uses; and so he was in in the *past*, not in the *per*, by his ancestor: for the fine was levied to divers persons, to the uses aforesaid. Nor was the gift a mere gratuity, but in consideration of marriage; and the debt accrued not till after the gift.

He admitted that if there had been any fraud in the case, or any purpose in Foskew, when he made the conveyance, to become the king's debtor or officer, it would be within the statute, and the gift had been a mere gratuity. Resolved that the lands should be discharged.

38. One Hawthorn having an office which rendered him an accountant to the crown, became indebted to Queen Elizabeth by obligation. Two years after he covenanted with one Coxhead, in consideration of his son marrying his daughter, to stand seised to the use of himself for life, remainder to the use of Coxhead and his daughter in tail. Hawthorn afterwards accepted another office of account, by reason of which he became indebted to the crown, and committed suicide.

Coxhead's case,
Moo. 126.

The crown having seised his lands, Coxhead petitioned that they might be discharged: to which it was answered, that the lands were subject to what was due to the crown by reason of the first office, which he had before the conveyance, by the statute 13 Eliz.: but as to the office which he had accepted after the conveyance, the arrears of that was not a charge upon the lands conveyed. Upon Coxhead's paying the arrears of the first office, he had an *amoveas manus*.

39. In conformity to the principle that a tenant in tail can only alien or charge his estate for his own life, all leases made by tenants in tail might have been avoided after their death, by their issue. But by the statute 32 Hen. 8. c. 28. tenants in tail are enabled to make leases for three lives or twenty-one years, which shall bind their issue; though not the persons in remainder, or the reversioner.

Tenants in tail
may make
leases.

Tit. 32. c. 5.

40. By the statute 6 Geo. 4. c. 16. s. 65. repealing 21 Jac. 1. c. 19. s. 12. the commissioners of bankrupts are enabled by deed enrolled to make sale for the benefit of the creditors, of any manors or hereditaments whereof any bankrupt is seised, of an estate tail in possession, reversion, or remainder, whereof no reversion

Are subject to
the bankrupt
laws.

1 Mont. & Ma.
65.

or remainder is in the king, of the gift or provision of his majesty. It is further provided that all such conveyances shall be good against the said bankrupts, and the issue of their bodies, and against all persons whatever, whom the said bankrupts, by fine or common recovery or other ways or means, might cut off or debar from any remainder, reversion, rent, profit, title, or possibility in, to, or out of the said manors, &c.

s. 16. 17.

41. [The stat. of 1 & 2 Will. 4. c. 56. which establishes the Court of Bankruptcy, repealed the above act, so far as relates to the conveyance of the bankrupt's real estate by the commissioners, and by s. 26. enacts that the bankrupt's real estate shall, without any conveyance, vest in the assignees for the time being, by virtue of their appointment.

s. 59.

42. The statute for abolishing fines and recoveries, 3 & 4 Will. 4. c. 74. s. 55. expressly repeals the above statute, 6 Geo. 4. s. 65. so far as relates to estates tail, and to that extent (*h*) also virtually repeals the 1 & 2 Will. 4. c. 56. s. 26.; and by s. 56. empowers any commissioner acting in any fiat after the 31st December, 1833, by deed enrolled within six months after its execution, to dispose of the lands of any bankrupt tenant in tail to any purchaser for the benefit of his creditors, and to create by such disposition as large an estate as the bankrupt himself could have done under the act.

s. 22. 37.

43. The act contains various provisions respecting persons who are to be the protectors of the settlement by which any estate tail is created, and requires the concurrence of such protector to enable the tenant in tail to make an absolute disposition of the entire fee, so as to bar the estates in remainder dependent upon his estate tail. Where the consent of such protector cannot be obtained, the tenant in tail, and in case of a bankruptcy, the commissioner, is empowered to convey a base fee, good against all persons claiming under any entail in the tenant in tail. The act also contains provisions for enlarging base fees into absolute fees upon there ceasing to be a protector; and contains the

s. 34. 58.

s. 60. 61.

(*h*) [The statute 1 & 2 Will. 4. c. 56. is still in force respecting the real estates of which a bankrupt is seized in fee, and indeed also respecting his estates tail until they are conveyed by the commissioners, for all the bankrupt's real estate whatsoever, is by sect. 26. vested in the assignees for the time being on their appointment. But the commissioners appear to be the proper parties to convey the bankrupt's estate tail under the stat. 3 & 4 Will. 4. c. 74. s. 56. and the assignees the proper parties to convey the bankrupt's estates in fee simple, under the 1 & 2 Will. 4. c. 56.]

following additional enactments relating to bankrupts' real estate.

That a voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, shall be confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to be a protector; but not against a purchaser without notice. s. 62.

That the acts of a bankrupt tenant in tail shall be void against any disposition under the act by the commissioner. s. 63.

That subject to the powers given to the commissioner and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition. s. 64.

That the disposition by the commissioner in certain cases specified shall be valid, notwithstanding the bankrupt's death at the time of the disposition. s. 65.

That every disposition by the commissioner of copyhold lands where the estate is not equitable, shall have the same operation as a surrender, and that the person to whom such land shall have been disposed of, may claim to be admitted on paying the fines, &c. s. 66.

That the assignees may recover rents and enforce covenants in respect of the bankrupt's lands. s. 67.

That the provisions of the act relating to bankrupts shall apply to their lands in Ireland.] s. 68.

44. Where a bankrupt was tenant in tail in possession, the commissioners of bankrupts, under the 21st Jac. 1. c. 19. s. 12. were enabled to convey the fee simple of the lands. Where he was tenant in tail in remainder, expectant on some preceding estate, the commissioners only acquired a base fee, determinable on failure of issue of the bankrupt. For the statute only enabled the commissioners to make such a title as the bankrupt himself might have made. [And it has been decided that even under a joint commission issued against tenant for life in possession, and tenant in tail in remainder, the bargain and sale of the commissioners passed no more than the estate for life in possession, and a base fee in remainder.]

Fearne's Op. 63.
Pye v. Daubuz,
3 Bro. R. 595.

Thus A. being tenant for life, with remainder to B. in tail male, with remainder over, and A. and B. being partners in trade, became bankrupts. It was held that a bargain and sale under

Jervis v. Taylor, 3 B. & Ald. 657.

a joint commission against them vested in the assignees the life estate of A., and a base fee determinable on the death of B., and failure of heirs male of his body.]

And to forfeiture
for treason.

1 Inst. 392. b.
Plowd. 237.
Vin. Ab. For-
feit. C. pl. 4.

26 Hen. 8. c. 13.

45. We have seen that conditional fees were liable to forfeiture for high treason, as soon as the donee had issue. When the statute *De Donis* was made, it was resolved that lands entailed were not forfeited for treason, beyond the life of the tenant in tail, one of the causes of this statute being to preserve the inheritance in the blood of those to whom the gift was made, notwithstanding any attainder. But this exemption from forfeiture not being agreeable to the rapacious principles of Henry VIII. he had the address to procure a statute, whereby it is enacted, That every person convicted of high treason “shall lose and forfeit all such lands, tenements, and hereditaments, which any such offender or offenders shall have of any estate of inheritance, in use or possession, by any right, title, or means, &c. at the time of any such high treason committed, or any time after.” Saving to every person and persons, their heirs and successors (other than the offenders in any treason, their heirs and successors) all such rights, titles, &c. which they shall have at the day of the committing such treasons, or at any time afore.

Dowtie's Case,
3 Rep. 10. b.

46. The statute 26 Hen. 8. does not extend to attainders by parliament, or where the party stood mute. But by the statute 33 Hen. 8. c. 20. estates tail are forfeited by all manner of attainders of treason. And the actual possession of the lands is also transferred and vested in the crown presently by the attainder.

47. By the statute 34 & 35 Hen. 8. c. 20. estates tail of the gift of the crown were protected from forfeiture for treason. But by the stat. 5 & 6 Ed. 6. the former statute is repealed, as to estates tail of the gift of the crown, which are again made forfeitable for treason.

1 Inst. 372. b.
Hawk. P. C.
B. 2. c. 49.

3 Rep. 2. b.
Cro. Car. 428.

48. Lord Coke has stated the effect of these statutes in the following words:—“If tenant in tail in possession, or that hath a right of entry, be attainted of high treason, the estate tail is barred, and the land is forfeited to the king.” It has however been determined, that where a tenant in tail, with remainder to a subject, discontinues his estate before his attainder, his issue, having only a right of action, is not affected by it. But

where the immediate reversion is in the crown, the tenant in tail cannot create a discontinuance; so that a right of entry remains in the issue, which is forfeited by the attainer.

49. By the attainer for high treason of a tenant in tail in possession, the estate tail becomes forfeited to the crown during the life of the tenant in tail by the enacting part of this statute; and, in consequence of the exception in the saving clause, it also remains in the crown during the existence of the heirs of the body of the tenant in tail, and of all such of his collateral heirs as would have been inheritable to the estate tail, if there had been no attainer.

50. But neither the estates in remainder, nor the reversion, are forfeited by the attainer of the person having the preceding estate tail: therefore, if a tenant in tail, with a remainder over, or reversion in another person, is attainted of high treason, the crown will thereby only acquire a base fee, as long as there are heirs of the person attainted capable of inheriting the estate tail, if there had been no attainer; and upon failure of such heirs, the remainder man or reversioner will become entitled, as being within the words of the saving. But where the reversion is in the crown, all will be forfeited.

51. The statute 26 Hen. 8. only extends to cases of high treason; therefore as to felonies, the statute *De Donis* still remains in force; so that, by attainer of felony, estates tail are only forfeited during the life of the tenant in tail; the inheritance being by the latter statute preserved to the issue. And Lord Coke says, if tenant in tail of lands holden of the king be attainted of felony, and the king, after office, seisseth the same, the estate tail is in abeyance.

But not for
Felony.
1 Inst. 392. b.

Id. 345. a.

52. Estates tail had not existed a long time before they were found to be productive of all those inconveniences which must ever attend property that is unalienable. Thus Lord Coke says—“The true policy of the common law was overturned by the statute *De Donis Conditionalibus*, 13 Ed. 1., which established a general perpetuity, by act of parliament, for all those who had or would have it; by force whereof all the possessions in England, in effect, were entailed accordingly; which was the occasion and cause of the said and divers other mischiefs: and the same was attempted and endeavoured to be remedied at divers parliaments; and divers bills were exhibited accordingly, (which

Modes of barring
estates tail.

6 Rep. 40. b.

I have seen), but they were always, on one pretence or other, rejected. But the truth was, that the lords and commons knowing that their estates tail were not to be forfeited for felony or treason, as their estates of inheritance were, before the said act, (and chiefly in the time of Henry III. in the barons' wars); and finding that they were not answerable for the debts or incumbrances of their ancestors; nor did the sales, alienations, or leases of their ancestors bind them, for the lands which were entailed to their ancestors; they always rejected such bills.

Vol. 2. p. 142. 53. It appears from the rolls of parliament, that in 17 Edw. III. the commons petitioned the king that the statute of Westm. 2 might be declared, in what degree the issue in tail might alien; to which his majesty answered, that the law formerly used in this case should continue.

Lit. s. 720.
10 Rep. 37. b.
Tit. 32. c. 25.

54. The impossibility of obtaining a legislative repeal of the Statute *De Donis* induced the judges to adopt various modes of evading its effects, and of enabling tenants in tail to charge or alien their estates. The first of these was founded on the idea of a recompence in value; in consequence of which the judges held that the issue in tail was bound by the warranty of his ancestor, where assets of equal value descended to him from such warranting ancestor.

Tit. 36.

35. The next was, that a feigned recovery should bar the issue in tail, and the remainders and reversion; a doctrine established in the reign of Edward IV. The last was by the Legislature, who made two acts of parliament in the reigns of Henry VII. and Henry VIII., by which a fine is declared to be a bar to the issue in tail.

Tit. 35.

Tit. 36. c. 10.
3 & 4 Will. 4.
c. 74. s. 18.

56. By the statute 34 & 35 Hen. 8. c. 20. estates tail granted by the crown as a reward for services are protected from the general operation of fines and recoveries, and are by that means rendered absolutely unalienable.

57. By the statute 42 G. 3. c. 116. s. 52. tenants in tail are enabled to convey such parts of their estates as shall be deemed eligible and necessary to be sold for the redemption of the land tax charged thereon, by deed indented and enrolled, or registered in the manner prescribed by this act, in which it is declared that every such deed shall be as effectual as if the tenant in tail had levied a fine, or suffered a recovery thereof.

Fines and recoveries abolished.

58. [The late act of the 3 & 4 Will. 4. c. 74. for abolishing

finer and recoveries, and for the substitution of more simple modes of conveyance, has made most important alterations in the law of real property, (not in Ireland) and a short epitome of its leading enactments will be proper in this place. By section 2, no fine or recovery can be levied or suffered after the 31st day of December, 1833. By sections 4, 5, 6, salutary provisions are made respecting fines and recoveries in lands of the tenure of ancient demesne, and which will remove serious objections from many titles to land of that tenure. By sections 7 to 12 inclusive, provisions are inserted for curing the defects of fines and recoveries in certain cases. The 14th section abolishes all future warranty of lands as a bar to estates tail and remainders thereon.

59. By the 15th section, after the 31st day of December, 1833, every actual tenant in tail (s. 1.) whether in possession remainder, contingency, or otherwise, is empowered (by deed enrolled within six calendar months after its execution) to dispose of an estate in fee simple, or any less estate in the lands entailed, as against all persons claiming under any entail vested in or claimable by the tenant in tail at the time of making the disposition, and against all persons, including the king, having estates to take effect after or in defeasance of the estate tail. By s. 19., a similar provision is made in favour of a person having a base fee, who would have been actual tenant in tail had the estate tail not been barred.

60. The 22d and following sections, down to the 37th inclusive, more particularly relate to the person who is designated the protector of the settlement, by which the estate tail is created. The owner of the first subsisting estate under the settlement, whether for years determinable on life or lives, or any greater estate, not being an estate for years, prior to the estate tail, is to be the protector, so far as relates to the lands in which such prior estate shall be subsisting; notwithstanding the owner of such prior estate shall have disposed of or incumbered it. An estate by curtesy or an estate by way of resulting use or trust under the same settlement, is to be deemed a prior estate within the meaning of the clause. If there are two or more owners of such prior estate, each is to be the sole protector as to his share. If a married woman be the owner of such prior estate, she shall be the sole protector, if the estate be to her separate use, if not, she and her husband shall be the protector, and deemed one owner. Estates confirmed or restored by settlement, shall, as regards the

And more simple modes of assurance substituted by 3 & 4 Will. 4. c. 74. s. 40. 41. s. 21.

The protector of the settlement.

s. 23.

s. 24.

s. 25.

protector for the purposes of the act, be deemed subsisting estates under the settlement.

s. 26. No lessee at a rent is to be protector.

s. 27. No tenant in dower, and (except in the case of a trustee in any settlement made before the passing of the act, who would have been necessary to make the tenant to the præcipe for suffering a recovery of the lands thereby entailed) no bare trustee, his heir, executor, administrator, or assign as such, shall be the protector.

s. 28. Where there shall be more than one estate prior to the estate tail, and the owner of the prior estate shall, by either of the two preceding sections, (26, 27), be disabled from being protector, then the person, if any, who, if such estate did not exist, would be the protector of the settlement, shall be the protector.

s. 29. When an estate under a settlement shall have been disposed of before the 31st of December, 1833, the person, who in respect of such estate, would have been the party to make the tenant to the writ for suffering a recovery of the lands entailed by such settlement, shall, during the continuance of such estate be the protector.

s. 30. Where a person, having disposed of wholly or partially an estate in remainder or reversion in fee, would have been the protector of the settlement entailing the lands in which such remainder or reversion may be subsisting, and would thereby be enabled to concur in barring the remainder or reversion, (which he could not have done if he had not become such protector) then the person who would have been the party to have made the tenant to the writ in a recovery of such lands, shall (during the continuance of the estate which conferred the right to make such tenant) be the protector.

The 32d section authorises settlors entailing lands to appoint any persons, not exceeding three, and not aliens, to be protector of the settlement in lieu of the person who would otherwise have been protector: and either for the whole or part of the period for which such person would have been the protector; and by means of a power in the settlement to perpetuate, during the whole or part of such period, the protectorship; and for that purpose, in case of death or resignation to substitute other persons *in esse*, not being aliens; the number of persons constituting the protector

not to exceed three. The deed appointing the protector to be enrolled in Chancery within six months after execution.

By the same section it is provided, that the person who would s. 32.
have been the sole protector, but for that clause, may be one of the persons appointed to be protector, and unless otherwise directed by the settlor, shall act as the sole protector, if the others die or resign and no substitute be appointed.

Sec. 33. Where the protector of a settlement shall be lunatic, idiot, or of unsound mind, whether so found by inquisition or not, the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, or other person entrusted by the king's sign manual with the care of lunatics shall be the protector. Where the protector shall be convicted of treason or felony, or any person not being the owner of a prior estate under a settlement, shall be protector of such settlement, and shall be an infant, or it shall be uncertain whether the protector be in existence, the Court of Chancery shall be the protector. Where the settlor shall declare that the person who would otherwise be entitled to the office of protector shall not be the protector, and shall fail to substitute any other person to be the protector, then the Court of Chancery shall be the protector. Or if in any other case where there shall be subsisting under a settlement, an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement, as to the lands in which the prior estate shall be subsisting, then the Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

61. The act having declared who is to be protector, next specifies the effect of his consent, or non-concurrence. Protector's consent, &c.

By the 34th section it is enacted, That if an actual tenant in s. 34.
tail, not entitled to the immediate reversion in fee, shall be desirous of making a disposition of the lands entailed, and there shall be a protector, then his consent shall be requisite to enable the actual tenant in tail to make an absolute disposition of lands to the full extent of his power under the act; but such tenant in tail may, without the protector's consent, convey a base fee good

against all persons claiming under any entail then vested in or claimable by the tenant in tail.

s. 35.

By s. 35. the consent of the protector is in like manner made requisite to enable the tenant in tail to enlarge a base fee into which his estate tail has been converted.

s. 36. 37.

By s. 36. 37. it is enacted that the protector is not to be subject to control in the exercise of his power of consenting, nor to the rules of equity in relation to dealings between the donee and the object of a power.

s. 38.

By s. 38. it is provided that a voidable estate created by a tenant in tail in favour of a purchaser for a valuable consideration, shall be confirmed by any subsequent disposition under the act, other than a lease not requiring enrolment, but not against a purchaser without notice.

Forms of conveyance under the act.

62. The modes of assurance by which dispositions under the act may be made, are next provided for.

The 40th section provides that every disposition of lands under the act by a tenant in tail shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made a disposition, if his estate were an estate at law in fee simple absolute, such disposition to be evidenced by deed ; but no disposition by tenant in tail resting only in contract either express or implied, or for valuable or meritorious consideration, or not, shall be of any force under the act. And if the disposition be by a feme covert, tenant in tail, the consent of her husband is necessary.

Section 41. provides that any assurance by a tenant in tail (except a lease not exceeding 21 years at a rack rent, or not less than five-sixths of a rack rent) shall be inoperative unless enrolled in Chancery within six calendar months after the execution thereof.

s. 42.
Consent of protector how given.

63. The consent of the protector must be given either by the same assurance by which the disposition of the tenant in tail shall be effected, or by a distinct deed to be executed either on or at any time before the day on which such assurance shall be made, otherwise the consent will be void.

s. 43.

The consent of the protector when given by a distinct deed, shall be considered unqualified unless it shall refer to the assurance and confine the consent to the disposition thereby made.

s. 44.

The consent of the protector is not to be revocable.

A married woman, if protector, may give her consent in the same manner as if she were a feme sole. s. 45.

Where the consent of the protector is given by a distinct deed, it will be void unless enrolled with or before the principal assurance. s. 46.

The jurisdiction of Courts of Equity is excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual. s. 47.

The Lord Chancellor, &c. when protector, is empowered to consent to a disposition by tenant in tail, and to make such orders as shall be thought necessary ; the order of the Lord Chancellor, &c. to be evidence of consent. s. 48 & 49.

64. The fiftieth and four following sections of the act relate to copyholds, and will be noticed in a future page. Sections 55 to 68 inclusive, have been noticed in a former part of the present chapter.] Tit. 37. c. 2. Supra, s. 41, &c.

65. It has been stated that money agreed or directed to be laid out in the purchase of land, is considered in equity as land. In cases of this kind where the land was directed to be conveyed to a person in tail, it was a settled rule in Chancery that where-ever a fine, which may be levied at any time, would have rendered the party absolute owner of the land, he was entitled to receive the money immediately. If a recovery, which can only be suffered in term time, was necessary, there the Court of Chancery would direct the money to be actually laid out in the purchase of land, in order to give the persons in remainder their chance of the first tenant in tail's dying before he could suffer a recovery. And money entailed. Tit. 1. s. 4. Edwards v. Warwick. 2 P. Will. 171.

66. By the statute 39 & 40 Geo. 3. c. 56. reciting the practice of courts of equity, as stated in the preceding section, it is enacted, that courts of equity, on petition of the first tenant in tail, and of the owner or owners of any prior particular estate or estates being adults, or of femes covert being separately examined, may order such money to be paid to them, or applied as they shall appoint.

67. Upon a petition under this act, by a tenant for life, and the first of several tenants in tail in remainder, Lord Rosslyn said, that having consulted Lord Kenyon, Lord Eldon, and the Master of the Rolls, as to the manner in which the act should be executed, they had agreed that it would be proper not to Lowton v. Lowton, 6 Ves. 12. n.

order the money to be paid out of court, till such time as the tenant in tail might actually have suffered a recovery of the land. The court made the order: but directed that it should have no effect, unless the tenant in tail should be living on the second day of the next term.

6 Ves. 116. 576.

8 Ves. 609.

It was also settled, that in cases of this kind there must be a reference to the master to enquire whether the parties had in any manner incumbered their interests in the money. On the further construction of this act, see the case of *Baynes v. Baynes*.

9 Ves. 462.

68. [The above act of 39 & 40 Geo. 3. c. 56. has been repealed and its provisions altered and enlarged by the 7th Geo. 4. c. 45. The latter act authorizes the Courts of Equity or the Court of Exchequer upon the petition of persons who would be tenants in tail of the estates to be purchased, and of the persons whose concurrence would be necessary and sufficient to enable the tenants in tail to bar their estates tail, and the rights and interests of all persons in remainder, expectant on their estates tail, such petitioners being adults, and if *femes covert* being separately examined and consenting (except where the funds are less than 200*l.* when such consent is unnecessary) to make the orders therein mentioned; (namely) in case the petition be presented by tenants in tail in possession of the hereditaments to be purchased free from incumbrances, or by tenants of the first estates tail with or without the consent of the owners of the antecedent particular estates or charges, to order the money to be paid to the petitioners or any of them, or to be applied in such manner as they shall appoint and the court approve: and in case such petition be presented by any person who would be tenant in tail in possession, but without the concurrence of all persons who would be entitled to any charge or encumbrance antecedent to the estate tail; or shall be presented by persons who would be tenants of some estate tail therein, with the consent of the persons whose concurrence would be necessary and sufficient to enable such tenants in tail to bar the estates tail and all rights and interests of persons in remainder after such estate tail, but without the concurrence of all persons who would be entitled to particular estates or encumbrances upon the said hereditaments antecedent to such estate tail, to declare that such estate tail and all remainders, &c. thereon expectant shall be barred; and

to order that the estates, when purchased with the money subject to the trust, shall be settled (subject to the uses, estates, and interests antecedent to such estate tail) to the use of the persons who would have been entitled to such estate tail their heirs and assigns.

In Re Silcock's estate.
3 Russ. 369.

69. The above statute of the 7th Geo. 4. c. 45. has (except as to proceedings, commenced before the 1st of January, 1834) been repealed by the late statute for abolishing fines and recoveries and other enactments have been substituted.

70. By the 71st section of the latter act it is provided that land to be sold of freehold, leasehold, or any other tenure where the money arising from the sale thereof shall be subject to investment in the purchase of lands (g) to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money to be invested in the purchase of land to be so settled, shall, for all the purposes of the act, be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and that all the previous clauses of the act, so far as circumstances will admit, shall in the case of lands to be sold as thereinbefore mentioned of any tenure, (except copyhold) apply to such lands, as if the lands to be purchased with the money to arise from the sale thereof, were directed to be freehold, and were actually purchased and settled; and shall, in case of the lands to be sold being copyhold, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and in case of money to be invested in land, to be so settled, shall apply to such money as if directed to be invested in freehold lands, and such lands were actually purchased and settled; with the exception that in every case where dispositions under that clause shall be made of leaseholds for years or money so circumstanced as above, such leaseholds or money shall be deemed personalty; and (except in case of bankruptcy) such disposition thereof shall be made by assignment, by deed enrolled within six calendar months after execution; and in case of bankruptcy, such disposition shall be made by the commissioner and enrolled, as before required in regard to lands not copyhold.

3 & 4 Will. 4.
c. 74.

(g) See sec. 1 of the act, where this expression applies to lands in Ireland.

71. Sections 77 to 80, apply to dispositions under the act by married women, who are thereby empowered with their husbands' consent, to dispose of lands and money to be invested in lands, and to release and extinguish powers, &c. as *fèmes soles*; and every disposition by a married woman (not executed by her as protector) is to be acknowledged by her before a judge of one of the superior courts at Westminster, a Master in Chancery, two of the perpetual or two special commissioners under the act, and who are required to examine her apart from her husband.

TITLE III.

ESTATE FOR LIFE.

CHAP. I.

Nature of an Estate for Life, and its Incidents.

CHAP. II.

Waste by Tenants for Life.

- SECT. 1. *Description of.*
 2. *How created.*
 9. *Held of the Grantor.*
 10. *Not Inalienable.*
 14. *Subject to Merger.*
 16. *Tenants for Life entitled to Estovers.*
 21. *And to Emblements.*
 26. *May pray in Aid.*
 27. *Not bound to pay off Incumbrances.*
 28. *But must keep down the Interest.*

- SECT. 29. *When they may keep the Title Deeds.*
 32. *May alien their Estates. And, when constructive Trustees, may convey the whole fee.*
 33. *What Acts amount to a Forfeiture.*
 43. *General Occupancy.*
 45. *Estates pour auter vie vest in Executors.*
 48. *Special Occupancy.*
 55. *Ecclesiastical Persons are qual Tenants for Life.*

SECTION I.

AN estate for life is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons; or to the happening or not happening of some uncertain event. It is in most respects similar to the *ususfructus* of the civil law, which is thus defined in Justinian's institutes:—
Ususfructus est jus alienis rebus utendi fruendi, salvâ rerum substantiâ. For the tenant for life has a right to the possession, and annual produce of the land, during the continuance of his estate;

Description of.

Lib. 2. Tit. 4.

without having the *proprietas*, that is, the absolute property and inheritance of the land itself, which is vested in some other person.

How created.

2. Estates for life are of two sorts ; either expressly created by deed, or some other legal assurance ; or deriving their existence from the operation of some principle of law.

3. The first of these, which forms the subject of the present Title, arises where lands are conveyed to a man for the terms of his own life, or that of any other person, or for more lives than one; in all which cases he is called tenant for life, except where he holds for the life of another, when he is called tenant *pour auter vie*. And where a person having an estate for his or her own life, either by express limitation, or by the operation of some principle of law, grants it over, the grantee becomes the tenant *pour autre vie*.

1 Inst. 41. b.

4. If lands are conveyed to a person for his own life, and that of A. and B., the grantee has an estate of freehold, determinable on his own death and the deaths of A. and B.; nor can there be any merger of the freehold, during the lives of A. and B. into the estate which the lessee has for his own life ; because, though an estate for a man's own life is greater than an estate for the life of any other person, yet here the lessee has not two distinct estates in him, but only one freehold, circumscribed with that limitation as the measure of its continuance.

Holman v.
Exton,
Carth. 246.
Vide stat.
6 Ann. c. 18.
2 Cox. R. 373.

5. By the statute 13 Cha. 2. c. 6. s. 2. It is enacted that if the persons for whose lives estates are granted shall go abroad, and no sufficient proof be made that they are alive ; in any action commenced for the recovery of the lands by the lessors or reversioners, the judge shall direct the jury to give their verdict as if the person so remaining abroad were dead. And it has been held that a remainder-man is within this statute.

6. The estates for life mentioned in the preceding sections will generally endure as long as the life or lives for which they are granted. But there are some estates for life which may determine upon future contingencies, before the death of the person to whom they are granted.

1 Inst. 42. a.

7. Thus if an estate be given to a woman, *dum sola fuerit*, or *durante viduitate*, or to a man and a woman during coverture, or as long as the grantee shall dwell in a particular house : in all

these cases the grantees have estates for life, determinable upon the happening of these events.

8. If a manor, generally worth 10*l.* a year, be granted to a person till he has received out of it 100*l.*; this will give him an estate for life; for as the profits are uncertain, and may rise and fall, no precise time can be fixed for the determination of the estate.

9. Tenants for life hold of the grantors by fealty, and such other reservations as are contained in the deed by which the estate is created. Where there is no reservation, they hold by fealty only; this estate not being comprehended within the provisions of the statute *Quia Emptores*.

Held of the Grantor.

Lit. s. 132.

Dissert. c. 2.

10. An estate for life is not capable of being entailed under the statute *De Donis*; for all estates tail must be estates of inheritance. Therefore, where an estate for life or lives is limited to a person and the heirs of his body, the latter words only operate as a description of the persons who shall take as special occupants during the life or lives for which the estate is held; and the grantee takes the absolute property, which he may dispose of by deed.

Not entailable

Tit. 2. c. 1. s. 24.

Low v. Barron,
3 P. Will. 262.
Ex parte Sterne,
6 Ves. 168.
Mogg v. Mogg,
1 Mer. 654.

11. Mr. Yates being entitled to lands under a lease for three lives, from the bishop of Winchester, conveyed the same in consideration of marriage, to trustees and their heirs, during the said lives, in trust for the intended husband, Sir Francis Man-
nock for life, remainder to his first and other sons in tail. By a subsequent settlement the estate was limited to Sir W. Man-
nock for life, remainder to his first and other sons in tail male, with remainders over. By indenture reciting the last settlement, and that Sir W. M. was seised of the said leasehold premises of and in an estate of descendible freehold, he covenanted to levy a fine *sur concessit* of the said premises, to the use of Sir W. M., his heirs and assigns. A fine was levied accordingly; and Sir W. M. surrendered the old lease, and took a new one, which he devised to trustees in trust to sell. A contract for sale having been entered into, the bill was filed for a specific performance.

Grey v. Man-
nock, 2 Eden's
R. 329.

Lord Henley —“ This is a descendible freehold, not intailable within the statute *De Donis*, and therefore no common recovery could be suffered of it: but the person who would have been tenant in tail, had it been an inheritance, is entitled to the abso-

lute ownership. It is like the case at common law of a conditional fee, which became absolute by the party's having issue." It was decreed that the contract should be carried into execution.

Blake v. Blake,
cited 3 P. Will.
10.

12. R. Blake devised a lease for three lives to trustees, in trust for his son R. Blake, and the heirs male of his body; and in case he should die without issue, then for the plaintiff, his other son, in like manner. R. Blake the son surrendered the old lease, and took a new one for three lives, to him and his heirs. R. Blake the son died without issue, having by his will disposed of the lease. A bill was filed by his second son to have the benefit of the new lease; insisting that the surrender of the old lease, and the taking of the new one, were not sufficient to bar the limitation to the second son; and that those claiming under R. Blake the son ought to be declared trustees of the new lease for the plaintiff.

S. C. 1 Cox's
Rep. 266.
Blake v. Luxton,
Cooper's Rep.
178.

The Court of Exchequer was of opinion that R. Blake the son being tenant in tail, (a) a court of equity could not have called upon him to have declared such a trust in his lifetime; that there was no stronger equity against his representatives; and dismissed the bill.

Doe v. Luxton,
6 Term R. 291.

Campbell v.
Sandys, Scho.
and Inf. Vol. I.
294.
Dillon v. Dillon,
1 Ball & Be.
77.

2 Eden's R.
341. n.

Subject to
merger.
1 Inst. 338. b.
See Tit. 39.

Dyer 10 b.
11 Rep. 83. b.
See Tit. 39.

Tenants for
life entitled to
estovers.

13. This doctrine was fully confirmed by Lord Kenyon, who also inclined to the opinion, that a person having an estate of this kind might dispose of it by will. But Lord Redesdale has said he could find no decision that at all warranted Lord K.'s *dictum*. That he found from his note of the case of Blake v. Blake, that though the estate was devised, the argument did not turn on the will, nobody conceiving that the estate would pass by it, if the *quasi* estate tail subsisted at the death of the testator.

14. An estate for life is subject to merge in the inheritance; therefore, whenever the tenant for life acquires the absolute property or inheritance of the lands, his estate becomes merged or drowned in the fee simple.

15. An estate *pour autre vie* will also merge in an estate for a man's own life, the latter being [to him] the more valuable [and in legal contemplation the greater estate.] Thus, if an estate be limited to a person for the life of another, remainder to himself for his own life, the first estate is merged.

16. Every tenant for life is entitled to estovers; that is, to allowance of necessary wood, which he may take upon the land,

(a) This must be a mistake; he was *quasi* tenant in tail.—Note by Mr. Cruise.

without any assignment, unless restrained by special covenants ; for *modus et conventio vincunt legem* : but affirmative covenants do not restrain. 1 Inst. 41. b.

17. Spelman says the word estovers, *estoverium*, is derived from the French word *estoffe*, material ; it is used in this sense in the statute Westm. 2. c. 25. which gives an assise of novel disseisin *de estoveriis bosci*. It is called botes in the Saxon language, and is divided into three sorts ; house bote, which is twofold, *estoverium ardendi et ædificandi* ; plough bote, *estoverium arandi* ; and, lastly, hay bote, *estoverium claudendi*. Gloss. 1 Inst. 41. b. 13 Rep. 63.

18. It was resolved in 28 Hen. 8. that where a lessor covenanted with a lessee that he should have thorns for hedges, by the assignment of the lessor's bailiff ; the lessee might cut thorns without assignment, for what the law gives by implication in the lease, that he may take without assignment ; otherwise where the lessee covenants negatively, that he will not take without assignment. Dyer 19. b. Hob. 173.

19. Tenants for life may cut down timber trees, at seasonable times, for the reparation of houses or fences : but a tenant for life cannot cut down timber to build new houses, or to repair those that he himself has improperly suffered to fall into decay. And where he cuts down more timber than is necessary, it is waste, though he asserts that he cut it down to employ it in future reparations. 1 Inst. 53. b. 54. b. Vin. Ab. Waste M.

20. In an action of waste, for cutting down three hundred oaks, the defendant, as to two hundred of them, pleaded that the houses let to him were ruinous, &c. and that he cut them down to repair those houses ; as to the residue, that he cut them down, and kept them to be used in reparations, *tempore opportuno*, &c. Gorges v. Stanfield, Cro. Eliz. 593.

The plaintiff demurred in law : but the Court held it no plea ; for if it should, every farmer might cut down all the trees growing on the land, when there was not any necessity of reparations. As to waste by tenants for life, it will be treated of in the next chapter.

21. Where a tenant for life dies before harvest time, his executors will be entitled to the crops then growing on the lands, as a return for the labour and expense of tilling and sowing the ground ; which the law calls emblements. And to emblements.

22. This rule extends to every case in which the estate for life determines by the act of God, or the act of law : but not where

Oland's case,
5 Rep. 116.

it is determined by the act of the tenant. Thus, if a woman who holds lands, *durante viduitate*, which is an estate for life, sows them, and afterwards marries, she will not be entitled to emblements, because her estate determined by her own act.

Idem.

23. If an estate be made to a husband and wife during coverture, and the husband sows the land, and afterwards they are divorced *causâ precontractus*, the husband will be entitled to emblements. For although the suit is the act of the party, yet the sentence which dissolves the marriage is the judgment of the law; *et judicium redditur in invitum*.

Hob. 132.

24 If, however, a person seised in fee of land sows it with grain, and after grants it to one for life, remainder over to another, and the first grantee dies before severance, the person in remainder shall have the corn, and not the executors of the first grantee; for the reason of industry and charge is wanting.

1 Inst. 55. b.

25. The word emblements only extends to such vegetables as yield an annual profit; so that if a person who is tenant for life plants fruit trees, or oaks, ashes, or elms, &c. or sows the ground with acorns, his executors will not be entitled to them. But if a tenant for life dies in August, before severance of hops, his executors shall have them, though growing on ancient roots.

Latham v. Atwood, Cro. Car. 515.

This determination was probably on account of the great expence of cultivating the ancient roots.

May pray in aid.
Booth's Real Act. 60.

26. In all real actions, a tenant for life may pray in aid, or call for the assistance of the person entitled to the inheritance, to defend his title; because the tenant for life is not generally supposed to have in his custody the evidences necessary to establish the right to the inheritance.

Not bound to pay off incumbrances.

1 Bro. R. 208.

218.

1 Ves. jun. 233.

Tit. 12. c. 3.

s. 12.

27. A tenant for life is not subject to the payment of any principal sums charged on the inheritance: therefore where he pays off an incumbrance of this kind, he becomes a creditor on the estate for the sum so paid; for otherwise he must be supposed to have paid it for the benefit of the persons entitled to the inheritance: but if a tenant for life does any act which shews an intention of paying off the charge for the benefit of the inheritance, he will not in that case be deemed a creditor.

But must keep down the interest.

Tracy v. Hereford, 2 Bro. R. 128.

28. Tenants for life are, however bound to keep down the interest of all incumbrances effecting the inheritance. And it has been lately determined that the rents and profits of an estate for life must be applied, not only in payment of all interest due

during the possession of the tenant for life, but also of all interest due before the commencement of that estate.

29. Although every person having a freehold interest has a right to the custody of the title deeds; yet Lord Hardwicke has said, it was the common practice for the Court of Chancery to direct the title deeds to be taken from the tenant for life, and deposited in Court, for the security of the persons entitled to the inheritance.

30. In a case where the title deeds of an estate had been sent to a master in chancery for the purpose of shewing the title to a part directed to be sold, and the tenant for life, after the sale, had obtained an order that they should be delivered to him; the persons entitled to the inheritance moved the Court of Chancery to discharge that order. Lord Henley refused the motion, observing it was his opinion that the tenant for life should have the deeds, except when brought into court, under an order for safe custody.

31. It is however laid down in a modern case, that although when title deeds are in the hands of the tenant for life, the Court of Chancery will not take them from him; yet when they are in other hands, the Court will not order them to be delivered to him. In a subsequent case it was said that when the tenant for life was satisfied, and did not care about the deeds, but the remainder man was not satisfied, the Court would take care of them, and not leave them in the hands of a third person. And in a late case Lord Eldon directed the title deeds of an estate to be delivered out of Court, upon the application of trustees and tenant for life, on the authority of Lord Henley. (*b*)

Pearhyn v. Hughes, 5 Ves. 99.

Burges v. Mawbey, 1 Turn. & R. 174.

When they may keep the title deeds.
2 P. Will. 477.
1 Atk. 431.

Webb v. Lord Lymington, 1 Eden. 8.

Hicks v. Hicks, Dick 650.

Ford v. Peering, 1 Ves. jun. 72.

Ante, s. 30.

(*b*) [The following observations and references to cases on the subject of the custody of title deeds by tenants for life, may not be unacceptable to the student.

Every tenant for life has *prima facie* a right to hold the title deeds of the estate. *Foff v. Peering*, 1 Ves. jun. 72. 76. *Strode v. Blackbourne*, 3 Ves. 225. *Bowles v. Stewart*, 1 Scho. and Lef. 209. 223. Where, therefore, a father is tenant for life, and his son tenant in tail or in fee, and there are no interests in strangers, the Court of Chancery will not, it seems, from the cases next cited, take the title deeds out of the hands of the father. *Pyncent v. Pyncent*, 3 Atk. 570. *Lord Lempster v. Lord Pomfret*, Amb. 154. *Webb v. Lord Lymington*, 1 Eden. 8. *Tourle v. Rand*, 2 Bro. C. C. 652. *Duncombe v. Mayer*, 8 Ves. 320. *Churchill v. Small*, *ib.* 322; unless there be evidence of spoliation. *Dixies v. Hilary*, Cary, 26, 7. Ed. 1820. *Crop v. Norton*, 2 Atk. 74. 76. *Smith v. Cooke*, 3 ib. 378. 381. *Ford v. Peering*, 1 Ves. jun. 72. 78, and see *Papillon v. Voice*, 2 P. Will. 476.

But when the tenant for life is a stranger to the remainder-man whose estate is imme-

May alien their estates.

32. Every tenant for life has a right to the full use and enjoyment of the land, and of all its annual profits, during the continuance of his estate. He has also the power of alienating his whole estate and interest, or of creating out of it any less estate than his own, unless he is restrained by condition. But if a tenant for life attempts to create a greater estate than his own, it must necessarily be void, upon the principle that *nemo dat quod non habet*. If, however, the person entitled to the inheritance is a party to the deed, there the tenant for life may join with him in conveying away the entire inheritance.

And, when constructive trustees, may convey the whole fee.

[Where an estate has been contracted to be sold, and the vendor dies before the completion of the purchase, having devised the estate in settlement to one for life, or other limited interest, with remainders over, and the specific performance is decreed, the tenant for life, or other limited interest is empowered by the 1 Will. 4. c. 60. sec. 17. to convey the whole fee or other interest contracted to be sold, or in such manner as the Court shall direct; and such conveyance is made as effectual as if the party conveying were seised in fee. The above act, section 18, applies to other constructive trusts as well as in the preceding instance, and also to resulting trusts.]

What acts amount to a forfeiture.

Gilb. Ten. 38. Wright, 203.

33. Estates for life are still, in some respects, considered as strict feuds, being forfeitable for many of the causes for which feuds were formerly forfeited. Thus where a tenant for life takes upon him to convey a greater estate or interest than that which he has, whereby the estate in remainder or the reversion is di-

rectly expectant upon the estate for life, the Court will, on the petition of the remainderman, without evidence of spoliation, order the deeds for safe custody. *Ivie v. Ivie*, 1 Atk. 430. *Pyncent v. Pyncent*, 3 ib. 571. *Lord Lempster v. Lord Pomfret*, Amb. 154: unless the remainder be remote. *Ivie v. Ivie*, *ubi supra*. *Joy v. Joy*, 2 Equ. Cas. Abr. 284, or contingent, *ib.* and *Noel v. Ward*, 1 Mad. 329.

"In the case of a jointress or dowress, the Court will, on confirmation of her jointure or dower, order her to deliver up title deeds to the person next entitled to the possession, *Petre v. Petre*, 3 Atk. 511. and *Ed. (n.) Tourle v. Rand*, 2 Bro. C. C. 652. *Senhouse v. Earl*, 2 Ves. sen. 450. *Leech v. Trollop*, *ib.* 662. *Ford v. Peering*, 1 Ves. jun. 76.

With respect to the custody of title deeds as between trustee and cestui que trust, the feoffee to uses before the statute of 27 Hen. 8. c. 10. was entitled to the custody of the deeds, and so it would seem by analogy, and for similar reasons the trustee who has the whole legal fee in him since the statute, is entitled to the custody of the deeds. *Lady Shaftsbury v. Arrowsmith*, 4 Ves. 67. 72. *Harper v. Faulder*, 4 Mad. 129. But upon the application of the cestui que trust, apprehending spoliation, the Court would, upon the authorities before cited, order the deeds for safe custody.]

vested, such conveyance will operate as a forfeiture of his estate for life; because it is a renunciation of the feudal connection between him and his lord; and the person in remainder or the reversioner may enter for the forfeiture.

34. Alienations of this kind may be either by deed or by matter of record. I. By deed, as if a tenant for life makes a feoffment in fee to a stranger, it is a forfeiture. So if there be tenant for life, remainder to another for life, and both join in a feoffment in fee to a stranger, it is a forfeiture of both their estates. 1 Inst. 251. a.
Tit. 33. c. 4.

35. If baron and feme, tenants for life, make a feoffment, this is a forfeiture during the coverture. So were the baron is seised in right of his wife, and the baron and feme make a feoffment, it is the same where the baron alone makes a feoffment. But in all these cases it shall not be any forfeiture against the wife after the death of her husband. 10 Vin. Ab. 371.

36. There are, however, several modern modes of assurance, which do not divest the estates in remainder or the reversion; and, therefore, have not the effect of creating a forfeiture of an estate for life. Tit. 32. c. 10.

37. II. By matter of record, as where a tenant for life levies a fine, or suffers a common recovery, such assurances will generally operate as a forfeiture of his estate; unless the person in remainder or reversion is a party to them. Tit. 35, 36.

38. Tenant for life may also forfeit his estate by disclaiming to hold of his lord, or by affirming, or impliedly admitting the reversion to be in a stranger, upon the feudal principle, that if the vassal denied the tenure, he forfeited his feud. This denial may be when the vassal claims the reversion himself, or accepts a gift of it from a stranger, or acknowledges it to be in a stranger; for in all these cases he denies that he holds his lands of the lord. But as by the feudal law, the vassal was to be convicted of this denial; so in the English law those acts which plainly amount to a denial must be done in a court of record, to make them a forfeiture, because such act of denial appearing on record, is equivalent to a conviction upon solemn trial. All other denials that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, were by our law rejected; for such convictions might be obtained without any just cause: but the denial of the tenure upon record could never be counterfeited or abused to any injustice. Dissert. c. 1.

Bac. Ab. Est.
for Life, C.

1 Inst. 251. b.
See stat.
3 & 4 Will. 4.
c. 27. s. 36, 37,
38.

39. If, therefore, a tenant for life be disseised, and bring a writ of right, this is a forfeiture of his estate; because, by suing that writ he admits the reversion in fee to be in himself, and by consequence denies that he holds over. So it is, if in a writ of right brought against him, he joins the mise on the mere right; for by taking upon himself the privileges of tenant in fee simple, he admits the inheritance to be in himself, which is a denial of the tenure.

1 Inst. 251. b.
252. a.
10 Vin. Ab. 378.

40. If a stranger brings an action of waste against a tenant for life, and he pleads *nul waste fait* in bar to the action, this is a forfeiture; because by this plea he admits the stranger to be a proper person to punish waste, if there be any.

41. If the demandant in a real action recovers against a tenant for life, by default, or *nient dedire*, or by pleading covenantously to the disherison of the person in reversion, these are forfeitures of his estate. For the tenant for life is entrusted with the freehold, and is to answer to the *præcipes* of strangers, and defend his own, as well as the reversioner's interest: but when he gives way to the demandant's action, he admits the right of the reversion to be in him, and consequently denies any tenure of his reversioner, which is a forfeiture.

P. C. vol. I.
251.

2 Inst. 19.

42. Estates for life are also forfeited by attainder of treason or felony. Lord Hale says, if tenant for life be attainted of treason, the king hath the freehold during the life of the party attainted; and in the case of felony, the profits of the land are forfeited during the life of the tenant for life.

General Occu-
pancy.

1 Inst. 41. b.
2 Comm. 259.

43. By the common law, where [lands were limited to A. during the life of B., and A.] died during the life of *cestui que vie*, the person who first entered on the land after his death might lawfully retain the possession thereof, as long as *cestui que vie* lived by right of occupancy; because it belonged to nobody, [there not being words of inheritance, it could not go to the heir, and being an estate of freehold, it could not devolve upon the executor.] But where the king had the reversion, no right of occupancy was allowed. For if the king's title and a subject's concur, the king's shall always be preferred; against the crown, therefore, there could be no prior occupant.

Geary v. Bear-
croft,
O. Bridg. 484.

44. There could be no [general] occupancy of incorporeal hereditaments, such as advowsons, rents, &c. (of which notice will

Co. Lit. 41. b.

be taken hereafter) [inasmuch as they lay in grant, and were not capable of actual possession.]

45. The right of general occupancy is now taken away by the statute 29 Car. 2. c. 3. s. 12. which enacts,—“That any estate *pour auter vie* shall be devisable by will, &c. and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple. And in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.”

Estates pour auter vie vest in executors.

46. By the statute 14 Geo. 2. c. 20. s. 9. reciting the statute 29 Car. 2. and that doubts had arisen, where no devise had been made of such estates, to whom the surplus, after debts paid, should belong: it is enacted,—“That such estates *pour auter vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said act, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate.”

47. It was held by Lord Eldon in a modern case, that the interest in an estate *pour auter vie* to a man, his executors, administrators, and assigns, beyond the debts, belonged to those who were entitled to the personal estate, [that is, to the residuary legatees, and the executor as special occupant was held a trustee for them: the will was not attested according to the statute of frauds, so that there was no disposition of the estate *pour auter vie*, but there was a general bequest of the residue of the testator's personal estate.]

Ripley v. Waterworth,
7 Ves. 425.
Milner v. Lord Harewood,
18 Ves. 273.

48. Where an estate was limited to a man and his heirs, or the heirs of his body, during the life of another person, no general right of occupancy could arise; for the heir or heirs of the body of such grantee might, and still may enter, on the death of his ancestor, and hold the possession as special occupant; having an exclusive right, by the terms of the original contract, to occupy the lands, during the residue of the estate granted.

Special Occupancy.

49. [It was for a long time considered an unsettled point whether executors or administrators could be special occupants

Doe v. Robinson, 8 Bar. & Cress. 296.

Tit. Occupant,
G. pl. 2.
Dyer 328.
pl. 10.

Buller v. Che-
verton,
2 Roll. Ab. 151.

of corporeal hereditaments.] It is stated in Roll's Abridgment, from a case in Dyer, that if a man leases land to one and his executors for the life of J. S., and *cestui que vie* dies, the executor shall be special occupant, though it be a frank tenement. In the next paragraph Roll inserts a case directly contrary. (c) If a man grants a rent to another, his executors and assigns, for the life of J. S., and after the grantee dies, making an executor, the executor shall not be a special occupant; because it is a frank tenement, which cannot descend to the executor.

Vol. 3. 466.

Irish Rep.
Vol. 1. 289.

Tit. Estate,
F. 1.

Vol. 3. 264.
note d.

Tit. Estate for
Life, 3.

50. Lord Hardwicke is reported by Atkins to have cited the first of these cases, and to have assented to it. Lord Redesdale has expressed strong doubts as to this point; and has justly observed that the title of an executor depends on his taking upon himself the administration of the will; therefore does not commence *instantly*, but by his subsequent act. As to an administrator, *ex necessitate* his title cannot commence *instantly*. It should, therefore, seem that the character of special occupant cannot properly belong to either. Lord Redesdale further observes, that on the contrary Lord Chief Baron Comyn, in his Digest, states the case in Dyer as having decided that the executor shall not have the land as special occupant; for an occupant has the freehold, which an executor cannot take; and refers to the second case stated in Roll as an authority for this point. That that case, which was long subsequent to the case in Dyer, was certainly in conformity to the opinion of Comyn; and according to *Salter v. Butler*, Moo. 664. Cro. Eliz. 901. Yelv. 9. the law seemed to have been understood by Peer Williams as so settled, though he did not appear satisfied with it.

51. In favour of the proposition that an executor or administrator may take a freehold estate as special occupant, is the following passage in Bacon's Abridgment, supposed to have been written by Lord Chief Baron Gilbert:—"If a lease be made of land to J. S., his executors and assigns, during the life of B., the executors of J. S. shall be the special occupants if he die in the life of B.; for though it be a freehold, which in due

(c) [The first case put by Roll is of a corporeal hereditament (namely) a lease of the land: the second case is the grant of a rent, an incorporeal hereditament, and therefore distinguishable from the former case.]

course of law would not go to executors, yet they may be designed, by the particular words in the grant, to take as occupants; and such designation will exclude the occupation of any other person; because the parties themselves, who originally had the possession, have filled it up by this appointment." (d)

52. [The case of *Ripley v. Waterworth* seems to have 7 Ves. 425. settled that executors and administrators can take, as special occupants, *corporeal hereditaments*; but until the recent decision of *Bearspark v. Hutchinson* the still more doubtful point 7 Bing. 178. remained, whether they could in any sense be special occupants of *incorporeal hereditaments*; it being admitted that in strictness there could not be occupancy of any thing which lay in grant.

53. In the latter case a rent charge was limited to A. (generally) during the life of B., and upon A.'s death in B.'s lifetime, intestate, a question arose whether the rent charge was not thereby determined, or whether it belonged to the administrator of A., as assets within the 29 Car. 2. c. 3. s. 12. It was contended that that statute applied only to estates *pour autre vie*, of which there could be occupancy at common law, and that as there could be no occupancy of a rent charge, it had expired. Tindal C. J. delivered the opinion of the Court of Common Pleas, that although there could not be *general* occupancy of a rent charge, for the reason above mentioned, nor in strictness *special* occupancy; yet upon the authority of Lord Coke and other early writers, it was said there could be a *quasi* special occupancy; and that as the statute was remedial, it was the soundest construction of the second branch of the 15th section, to hold that it included not only all such estates *pour autre vie*, as were so in strictness, but also all such as were in common parlance held to be the subject of special occupancy. The Court expressed their opinion confirmed by the decision of Lord Keeper Harcourt in *Rawlinson v. Duchess of Montague* and of Lord Chief Justice Willes in his reports.] 3 P. W. 264.n. Willes 505.

54. In a modern case it was held by Lord Kenyon and the other judges, that if an estate *pour autre vie* be limited to Atkinson v. Baker, 4 Term R. 229.

[(d) In addition to the above authorities among others may be cited the opinion of Lord Hardwick in *Westfaling v. Westfaling*, 3 Atk. 460, and in *Williams v. Jekyll*, 2 Ves. S. 681.

a man, his heirs, executors, administrators, and assigns; it descends to the heir as a special occupant, in preference to the executors.

Ecclesiastical persons are *quasi tenants* for life.

1 Inst. 44. a.
Id. 341. a & b.
Lit. s. 648.
infra, ch. 2.

55. Archbishops and bishops were formerly considered as tenants in fee simple of the lands which they held in right of their churches. As to rectors, parsons, and vicars, Lord Coke says, that for the benefit of the church, and of their successors, they were in some cases esteemed in law to have a fee simple qualified; but to do any thing to the prejudice of their successors, in many cases the law adjudged them to have in effect but an estate for life. Since the several statutes by which all ecclesiastical persons and corporations are restrained from alienation, except by leases for three lives, or twenty-one years, they are generally considered as *quasi tenants* for life only.

Tit. 32. c. 2 & 5.

56. In consequence of this principle, it is enacted by the statute 28 Hen. 8. c. 11. s. 6., that in case any incumbent, before his death, hath caused any of his glebe lands to be manured and sown, at his own proper costs and charges, with any corn or grain, that then all the said incumbents may make and declare their testaments of all the profits of the corn growing upon the said glebe lands so manured and sown.

TITLE III.
ESTATE FOR LIFE.

CHAP. II.

Waste by Tenants for Life.

SECT. 1. *Different Kinds of Waste.*

2. *Felling Timber.*
11. *Pulling down Houses.*
14. *Opening Pits or Mines.*
18. *Changing the Course of Husbandry.*
20. *Destruction of Heir Looms.*
21. *Permissive Waste.*
25. *Of the Action for Waste.*
23. *Waste restrained in Equity.*
38. *The Timber belongs to the Person entitled to the Inheritance.*

SECT. 46. *May be cut down by Order of the Court of Chancery.*

51. *Clause, without Impeachment of Waste.*
59. *How far restrained in Equity.*
66. *Is annexed to the privity of Estate.*
68. *Partial Powers to do Waste.*
71. *Waste by Ecclesiastics.*
80. *Accidents by Fire.*

SECTION I.

ALTHOUGH tenants for life are entitled to reasonable estovers, yet they are prohibited from destroying those things which are not included in the temporary profits of the land; because that would tend to the permanent and lasting loss of the person entitled to the inheritance. This destruction is called Waste; and is either voluntary, which is a crime of commission, or permissive, which is a matter of omission only. Voluntary waste chiefly consists;—1. In felling timber trees; 2. In pulling down houses; 3. Opening mines or pits; 4. Changing the course of husbandry; 5. Destroying heir looms.

Different kinds
of Waste.

2. The first kind of waste consists in felling timber trees, except for estovers, because they are not deemed part of the annual produce of the land, but belong to the owner of the

Felling timber.
1 Inst. 53. a.
11 Rep. 48. b.

inheritance; therefore the tenant for life has only a qualified property in them, as far as they afford him shade and shelter, and a right to take the mast and fruit.

11 Rep. 48. a.
1 Saund. 322.
n. 5.

3. In the case of leases for lives, where the timber is included, if the lessor fells the trees, the lessee may maintain an action of trespass against him, and will be entitled to recover damages adequate to the loss he sustains; because the lessee has, by his lease, a particular interest in the trees, such as the mast and fruit of them, and shade and shelter for his cattle; and may lop them, if they be not thereby injured. But the property of the body of the trees remains in the lessor, as parcel of his inheritance; who may punish the lessee in an action of waste, if he fells or damages any of them. So that both the lessor and lessee have an interest in the trees; therefore if a stranger cuts them down, each of them shall have an action against him, to recover their respective loss.

Foster v.
Spooner,
Cro. Eliz. 18.

4. Where the trees are excepted in the lease, which is usually done, the lessee has no interest whatever in them; and the lessor may have an action of trespass against him, if he either fells or damages them. The lessor has also a power, as incident to the exception, to enter upon the land, in order to fell and take away the trees; though this power, for the greater caution, is often expressly reserved.

Heydon v.
Smith,
Godb. 173.
Jackson v.
Cator, 5 Vea.
688.

Bullen v.
Denning,
5 B. & C. 842.
851.
22 Vin. Ab.
442.
Vide Tit. 22.
s. 25.

5. Timber trees are those which serve for building, or reparation of houses; such as oak, ash, and elm, of the age of twenty years and upwards. But where oak and ash are seasonable wood, and have been usually cut down at certain periods, it was formerly held that it was not waste to cut them down at that time: but I can find no modern decision on this point.

6. By the custom of some countries certain trees not usually considered as timber, are deemed to be such, being there used for building.

7. [Birch trees are considered timber in Yorkshire and Cumberland. (a) Beech, cherry and aspen, in Buckinghamshire. (b) Beech also in Gloucestershire (c) and Bedfordshire. (d) Beech

(a) [Cumberland's case, Moore, 812. *Pinder v. Spencer*, Noy, 30.

(b) Co. Lit. 53. a. Anon. 2 Roll. Rep. 83. *Aubrey v. Fisher*, 10 East, 446. *Wright v. Powle*, Gwill. Tithe Ca. 357. *Bibye v. Huxley*, Bunb. 192.

(c) *Rex v. Minchin Hampton*, 3 Burr. 1309. *Abbott v. Hicks*, 1 Wood. Tithe Ca. 319. *Welbank v. Hayward*, 3 Wood. 512.

(d) *Bibye v. Huxley*, 2 Wood. 237.

and willow in Hants. (e) In some places, whitethorn, holly; (f) blackthorn; (g) horse chesnut, lime, yew, walnut, crab, and hornbeam; (h) in other districts, pollards or other timber trees which have been lopped are, contrary to general estimation, also considered timber. (i)]

8. If a tenant for life tops timber trees, or does any thing else which causes them to decay, it is waste. So if he suffers the young germins or shoots to be destroyed, or stubs them up. 1 Inst. 53. a. Dyer, 65. a.

9. Lord Coke says that cutting down willows, birch, beech, asp, maple, or the like, standing in the defence and safeguard of a house, is waste; as also the stubbing up a quickset fence of whitethorn, or suffering it to be destroyed. He also states that cutting dead wood is not waste; but that turning of trees to coals for fuel, when there is sufficient dead wood, is waste. [But it seems to be now settled that if a bare tenant for life cuts down decayed timber, it is waste. (k)] 1 Inst. 53. a.

10. All tenants for life have a right to cut down coppices and underwoods, at seasonable times, according to the custom of the country; for no advantage can arise to a tenant for life from woods of this kind, but by the sale of them. It was however held, in a modern case, that a tenant for life has no property in the underwood till his estate comes into possession; and cannot have an account of what was cut wrongfully by a preceding tenant. [As to what may be considered underwood the reader is referred to the *King v. Ferrybridge*, the reporter's note and the cases there cited.]

Pigot v. Bullock, 1 Ves. jun. 479.

1 Barn. & Cross 375. 379.

11. Waste may be done in houses, by pulling them down, or by suffering them to be uncovered, whereby the timbers become rotten. If, however, a house be uncovered when the tenant comes in, it is no waste to suffer it to fall down: but it would be waste to pull it down, unless it is rebuilt.

Pulling down houses. 1 Inst. 53. a.

12. If a lessee for life razes a house, and builds a new one, which is not so large as the former, it is waste. But where an

Bro. Ab. Waste 93.

(e) *Layfield v. Cowper*, 1 Wood. 330. *Guffley v. Pindar*, Hob. 219.

(f) *Pinder v. Spencer*, Noy, 30. 1 Inst. 53. a. note (10).

(g) *Cook v. Cook*, Cro. Car. 531.

(h) *Duke of Chandos v. Talbot*, 2 P. Will. 606. *Walton v. Tryon*, Gwil. 832.

(i) *Soby v. Molyns*, Plow. 470. Anon. Gwil. 165. *Duke of Chandos v. Talbot*, ubi supra.

(k) *Perrot v. Perrot*, 3 Atk. 94; and see *Whitfield v. Bewit*, 2 P. Will. 240. S. C. 3 *Ibid.* 266; see also *Wickham v. Wickham*, 19 Ves. 419.]

old house falls down, and the tenant builds a new one, it need not be so large as the old one.

1 Inst. 53. a.

13. If glass windows, though put in by the tenant himself, be broken or carried away, it is waste. So it is of wainscot, benches, doors, furnaces, and the like, annexed or fixed to the house, either by the reversioner or the tenant.

Opening pits
or mines.

1 Inst. 53. b.

54. b.

Saunders's case,

5 Rep. 12.

14. A tenant for life cannot dig for gravel, lime, clay, brick earth, stone, or the like, unless for the reparation of buildings, or manuring of the land. Nor can he open a new mine: but he may dig and take the profits of mines that are open.

Clavering v.

Clavering,

2 P. Wms. 388.

15. Lord King has said that a tenant for life of coal mines, may open new pits or shafts for working the old vein of coals; for otherwise working the same mines would be impracticable.

Saunders's case,

5 Rep. 12.

16. If a person has mines within his land, and leases the land, and all mines therein, the lessee may dig for them; for otherwise he can derive no advantage from the mines.

Whitfield v.

Bewit, 2 P.

Wms. 240.

17. Where a person seised in fee of lands, in which there were mines unopened, conveyed those lands, and all mines, &c. to trustees and their heirs, to the use of A. for life, &c. A. having threatened to open the mines, the reversioner brought in a bill in Chancery to stay him. It was argued on behalf of A. that the mines being expressly granted by the settlement with the lands, it was as strong a case as if the mines themselves were limited to A. for life, and like Saunders's case. But Lord Macclesfield said, that A. having only an estate for life, subject to waste, could no more open a mine, than cut down timber trees. On a rehearing, Lord King was of the same opinion.

Changing the
course of hus-
bandry.

1 Inst. 53. b.

Dyer 37. a.

Gunning v.

Gunning,

2 Show. R. 8.

18. The conversion of one kind of land into another, as the changing of meadow to arable, is also waste; because it not only changes the course of husbandry, but also the evidence of the estate. In a subsequent case it was said *arguendo*, that the ploughing of pasture may be, or may not be, waste; and to make it such, it ought to have been pasture time out of mind. It was not enough to say that it was pasture ground *diu ante*. Mr. Just. Jones said, arable and pasture ground are convertible; and that which is one of them this year may be the other next, for the law does not so much distinguish.

Worsley v.

Stewart, *infra*.

a. 35.

19. The plowing up, burning and sowing of down land is waste. But in the present improved state of agriculture I pre-

sume that the old doctrine respecting a change of the course of husbandry would not be strictly adhered to.

20. As some chattels are considered in law as part of the inheritance, and called heir looms, so the destruction of them is waste. Thus, if a tenant for life of a park, vivary, warren, or dove-house, kills so many of the deer, fish, game, or doves, that there is not sufficient left for the stores, it is waste.

Destruction of heir looms.
Tit. 1.
1 Inst. 53. a.
2 — 304.

21. Permissive waste chiefly consists in suffering the buildings on an estate to decay. But if a house be ruinous at the time when the tenant for life comes into possession, he is not punishable for suffering it to fall down: for in that case he is not bound by law to repair it. Yet if he cuts down timber, and therewith repairs it, he may justify; because the law favours the maintenance of houses.

Permissive waste.
1 Inst. 53. a.
54. b.

22. The Court of Chancery will not decree a tenant for life to repair, or appoint a receiver, with directions to repair; for it would tend to harass tenants for life; and suits of this kind would be attended with great expenses, in depositions about repairs.

Wood v. Gaynon, Amb. 395.

23. It is a general rule that waste which ensues from the act of God is excusable. So that if a house falls in consequence of a tempest, the tenant will be excused. But where a house is uncovered by a tempest, the tenant is bound to repair it within a reasonable time, before the timbers grow rotten.

2 Roll. Ab. 820.

24. If the banks of a river are destroyed by a sudden flood, it is not waste. If, however, the banks of the river Trent are unrepaired, it is waste; because the Trent is not so violent, but that the lessee, by his industry, may well enough preserve its banks.

1 Inst. 53. b.
Dyer 33. a.
Moo. 69.

25. By the common law, where lands were granted to a person for life, he was not liable to an action for waste unless he was restrained by express words in his conveyance, from committing waste; because it was in the power of the person who created the estate to impose such terms on his tenant as he thought proper. This doctrine was found extremely inconvenient, as tenants took advantage of the ignorance of their landlords, and committed acts of waste with impunity.

Of the action for waste.
Blackst. Com.
B. 3. c. 14.

26. To remedy this grievance the statute of Marlbridge, 52 Hen. 3. c. 24. gave to the owners of the inheritance an action

2 Inst. 144.

of waste against tenants for life ; in which they were entitled to recover full damages for the waste committed. But as the recompence given by this statute was frequently inadequate to the loss sustained, the statute of Gloucester, 6 Edw. 1. c. 5. increased the punishment, by enacting that the place wasted should be recovered, together with treble damages, as an equivalent for the injury done to the inheritance.

2 Inst. 299.

1 Inst. 53. b.
218. b. n. 2.
Paget's case,
5 Rep. 76. b.
Bray v. Tracy,
Cro. Jac. 688.

27. No person is entitled to an action of waste against a tenant for life, but he who has the immediate state of inheritance, expectant on the determination of the estate of life. If there is an estate of freehold *in esse*, interposed between the estate of the tenant for life who commits waste, and the subsequent estate of inheritance, then during the continuance of such interposed estate the action of waste is suspended ; and if the first tenant for life dies during the continuance of such interposed estate, the action is gone for ever.

2 Inst. 302.

28. Where a tenant for life commits waste, and afterwards assigns over his estate, yet an action of waste may be brought against him.

Clifton's case,
5 Rep. 75.

29. If a woman lessee for life marries, and her husband commits waste, and after the wife dies, the action of waste is gone ; for the husband never had any estate but in right of his wife.

30. The statute of Marlbridge only prohibits farmers from committing waste ; yet if they suffer a stranger to do waste, they shall be charged with it : for it is presumed in law that the farmer may withstand it : *et qui non obstat, quod obstaré potest, facere videtur*. Secondly, the law gives to every man his proper action ; therefore the lessor shall have his action of waste against the lessee ; and the lessee his action of trespass against the person who committed the waste.

2 Saund. 252.
n. 7.

31. The late Mr. Serjeant Williams, in his excellent Notes on Saunders's Reports, observes that the action for waste is now very seldom brought (*l*) ; having given way to a much more expeditious and easy remedy by an action on the case, in the nature of waste ; which may be brought by the person in reversion or remainder for life or years, as well as in fee ; and the plaintiff is entitled to costs ; which he cannot have in an action of waste.

(*l*) [The writ of waste is abolished after 1 June, 1835, by stat. 3 & 4 Will. 4. c. 27. s. 36. See Vol. III. Tit. 31. Ch. II. sect. 5. note.]

32. Lord Cowper says, that without some particular circumstances, there is no remedy in law or equity, for permissive waste, after the death of the particular tenant..

Turner v. Buck,
22 Vin. Ab.
523.

[But in the recent case of Marquis of Lansdowne v. the Marchioness Dowager of Lansdowne, it was decided that a bill might be maintained against the representatives of a deceased tenant for life for equitable waste committed by him; and that although according to the maxim *actio personalis moritur cum persona*, yet if the tort or injury is of such a nature as that thereby property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor (*m*) at law, for legal waste; and that equity would decide in respect of equitable waste, in analogy to a court of law. In the above case, the late Marquis of Lansdowne, tenant for life without impeachment of waste, had abused his power of cutting down timber, by cutting ornamental trees, and trees not fit for felling.]

1 Mad. 16.

Garth v. Cotton,
1 Dick, 183.
S. C.
3 Atk. 751.
1 Ves. S. 524.
546.

Cowp. 376.

33. It is stated in 1 Roll's Ab. 377. pl. 13. that if there be lessee for life, the remainder for life, the remainder or reversion in fee, and the lessee in possession wastes the land; though he is not punishable by the common law, during the remainder for life, yet he may be restrained in Chancery, for this is a particular mischief. And Lord Keeper Egerton is reported to have said that he had seen a precedent in the time of Richard II. where in such a case it was decreed in Chancery, by the advice of the judges, on complaint of the remainderman in fee, that the first tenant should not commit waste; and an injunction granted. The courts of equity have long pursued this principle, and will award a perpetual injunction against waste whenever the case requires it.

Waste restrained
in equity.

Moor 554.

34. There was a limitation in a settlement to a person for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainder to A. for life, remainder to his first and other sons in tail. The first tenant for life cut down timber; A., the second tenant for life,

Perrot v. Perrot,
3 Atk. 91.

(*m*) [By stat. 3 & 4 Will. 4. c. 42. s. 2. remedies by action of trespass or trespass on the case, are given against the executors of any deceased person, for any wrong committed by him in his lifetime against the property real or personal of another, committed within six months before the death, the action to be brought within six months after the executors, &c. have taken upon themselves the administration of the effects of the deceased. Similar remedies are given to executors for injuries done to the property real or personal of their testators.]

brought his bill for an injunction to stay waste. Lord Hardwicke said, that though A. had no right to the timber, yet if the first tenant for life should die without sons, the plaintiff would have an interest in the mast and shade of the timber. Therefore upon the authority of those cases, which had been very numerous in the Court, of interposing to stay waste in the tenant for life, where no action could be maintained against him at law, as the plaintiff had not the immediate remainder; the injunction was granted.

Worsley v.
Stewart, 4 Bro.
Parl. Ca. 377.

35. Mr. Worsley being tenant for life of a farm in Dorsetshire, consisting of poor arable land, with a sheep walk, and about four hundred acres of down land, under the will of Lady Stewart, who also left a writing under her hand, forbidding the ploughing of such lands as ought not to be ploughed; he ploughed up, broke, and burnt part of the down land. A perpetual injunction was granted by the Court of Exchequer, and confirmed by the House of Lords.

Farrant v.
Lovell,
3 Atk. 723.

3 Atk. 211.

36. A bill was brought by a ground landlord to stay waste in an under lessee. Lord Hardwicke said, that a certificate being produced of the waste, he was of opinion the plaintiff had the same equity as in other cases of injunctions; and granted the injunction. In another case, he said that he would have no scruple to grant an injunction to stay waste in favour of an unborn child.

2 Atk. 182.

37. A court of equity will also grant an injunction against waste, *pendente lite*. And Lord Hardwicke has said, that it is not necessary the plaintiff should wait till waste is actually committed: for where an intention to commit waste appears, and the defendant insists on his right to commit waste, the court will grant an injunction.

The timber be-
longs to the
person entitled
to the inheri-
tance.

Bowles's case,
1 Rep. 79.

38. Although no action of waste lies where there is an intermediate estate, yet if waste be done by felling timber trees, the person entitled at that time to the inheritance in fee, or in tail, may seise them, or bring an action of trover for the recovery of them. For a tenant for life has but a special interest in the trees growing on the land, so long as they are annexed to it: but if he or any other person severs them from the land, the interest of the tenant for life in them is thereby determined, and they become the property of the owner of the inheritance.

39. A feoffment was made to the use of A. for life, remainder to the use of his first and other sons in tail; remainder to B. for life, remainder to his first and other sons in tail. B. had issue a son, and after A., not having any son, cut down timber. It was resolved that the son of B. might have an action of trover against A. for the timber, because the property of the trees was in him who had the inheritance of the land when they were cut; and though the remainder for life to B. was an impediment to an action of waste during his life, yet it was not any impediment to his son, as to the property of the trees, when severed from the land, which B. could not have for the debility of his estate. And the possibility of the estate which might come to the son of A., if A. should have a son, was not any impediment; inasmuch as it was a mere possibility, which peradventure never would happen, and was nothing in law till it happened, and might be destroyed by the feoffment of A.

Uvedale v.
Uvedale, 7
2 Roll. Ab.
119.

40. One seised in fee of lands conveyed them to trustees and their heirs, to the use of A. for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, remainder to his two sisters and the heirs of their bodies, remainder to the grantor in fee. A. and B. had no sons, and one of the sisters died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance. A. having cut down timber, sold it; the heir of the grantor brought his bill for an account of a moiety. It was objected that it would be more agreeable to the rules of equity that the money produced by the sale of the timber should be brought into court, and put out for the benefit of the sons unborn, and which might be born: that these contingent remainders being *in gremio legis*, and under the protection of the law, it would be most reasonable that the money should be secured for the use of the sons, when there should be any born. But as soon as it became impossible there should be a son, then a moiety to be paid to the plaintiff. And the case would be the same if there were a son *in ventre matris*, or the plaintiff might bring trover; and then what reason had he to come into equity. Lord Macclesfield said, the right of this timber belonged to those who, at the time of its being severed from the freehold, were entitled to the first estate of inheritance:

Whitfield
v. Bewit,
2 P. Wms. 240.

and the property became vested in them. As to the objection that trover would lie at law, it might be very necessary for the party who had the inheritance to bring his bill; because it might be impossible for him to discover the value of the timber, it being in the possession, and cut down by the tenant for life.

1 Bro. C.C. 194.

3 — 37.

Pigot v. Bullock, *infra*.

The cause was reheard by Lord King, who was of the same opinion.

Newcastle

v. Vane,

2 P. Wms. 241.

41. It is the same where timber is severed from the land by accident. Thus where a great quantity of timber was blown down by a storm at Welbeck, the seat of the Duke of Newcastle; though there were several tenants for life, with remainder to their first and other sons in tail, yet these having no sons born, the timber was decreed to belong to the first remainder man in tail.

Garth v.

Cotton,

Tit. 16. c. 7.

42. Where there are trustees to preserve contingent remainders, the Court of Chancery will not allow of waste, by collusion, between the tenant for life and the person entitled to the first vested estate of inheritance, to the prejudice of persons not *in esse*.

43. Where the tenant for life has also the next existing estate of inheritance, subject to intermediate contingent remainders in tail, the Court of Chancery will not allow him to take advantage of that circumstance, by cutting down timber, but will preserve it for the benefit of the intermediate contingent remainder-men.

Williams v.

Duke of

Bolton, cited

3 P. Wms. 268.

44. The Duke of Bolton was tenant for life, with remainder to his first and other sons in tail, remainder to Mrs. Orde for life, remainder to her first and other sons in tail, with estates to trustees to preserve the contingent remainders, remainder to the Duke in fee. The Duke had no son, but Mrs. Orde had a son born, who died soon after. The Duke cut down timber. Mrs. Orde had afterwards another son, who was a defendant in the cause. On the question to whom this timber should belong, Lord Thurlow was of opinion, that as it was not competent for the Duke to cut down timber in respect of his life estate, he should not take advantage of his own wrong. That the timber, although by severance it became personalty, was yet bound as far as it could be, to the uses of the realty. That the administrator of Mrs. Orde's first son was certainly not entitled, the child being dead at the time of the timber cut. Neither could her second son

claim it; for although he had a vested estate of inheritance, yet such estate was liable to be divested by the Duke's having a son. He, therefore, thought nobody was then entitled to it; but directed the Duke to pay into Court the money for which the timber had been sold, and the interest thereof.

45. In pursuance of the above direction, the Duke of Bolton paid in the money arising from the timber. Upon his death in 1794 Mr. Orde, the husband of Mrs. Orde, as administrator of his eldest son, presented a petition to have the money paid to him; the Court directed a bill to be filed. The defendants were, the second son, who was tenant in tail in remainder of the estates, and the Duchess of Bolton, executrix of the late Duke.

Powlett v. Duchess of Bolton,
3 Ves. Jun. 374.
1 Cox Rep. 72.

Lord Loughborough said, when the timber was cut, no doubt, at law, the Duke would have taken, being the first owner of the inheritance. But the Court very properly held, that he should not, by a fraud on the settlement, which made him tenant for life, gain that advantage to himself in his reversion in fee; considering it as a wrong upon the settlement. The consequence was, that part of the property, which by the fraud was taken from the settlement, ought to be restored to it; that would carry it to all the uses. Mrs. Orde would be entitled to an estate for life, the children to estates in tail male; and he could not help the consequence of the reversion in fee going to the Duke.

Dare v. Hopkins,
2 Cox's R. 110.

46. The Court of Chancery has in some cases directed the timber growing on an estate, whereof a person was tenant for life, to be cut down, for the purpose of paying debts and legacies, charged upon the inheritance.

May be cut down by order of Chancery.

47. A person devised his estate to his wife for life, remainder to A. B. and his heirs, upon condition that he should pay several legacies at the times appointed in his will; if he did not pay them accordingly, the estate to go over. A. B. filed his bill in the Court of Chancery, stating that there was a great quantity of timber on the estate, which belonged to him; that he was willing it should be sold, and the legacies paid: but that the widow, who had barely an estate for life, and could make no profit thereof herself, in combination with the other remainderman, designing to make the plaintiff forfeit his estate, by non-payment of the legacies, had refused him permission to fell the

Claxton v. Claxton,
2 Vern. 162.

timber; though he offered satisfaction for any damages she should thereby sustain. He therefore prayed that he might have liberty to cut down and carry off the timber, and sell it for payment of the legacies.

The Court thought it reasonable that the plaintiff should have liberty to cut down and take off the timber; making satisfaction to the widow for breaking the ground, &c.; and referred it to the Master to see what quantity of timber was necessary to be felled for payment of the legacies, and what might be conveniently spared.

48. The Court of Chancery has also directed timber, in a state of decay, to be cut down for the benefit of the person entitled to the inheritance; provided no damage were done to the tenant for life.

Aspinwall
v. Leigh,
2 Vern. 218.

49. Sir G. Ireland by deed granted a term for 500 years to the defendant and others, of his estates in Lancashire, to commence after his decease, for payment of debts and annuities; and by will devised the reversion and inheritance thereof to the plaintiff for life, without impeachment of waste, remainder to his first and other sons in tail. The testator being dead, and the trustees in possession under the trust, which was like to have a long continuance; the plaintiff brought his bill, setting forth that he was reduced to great want; that there was much decaying timber on the estate, which the trustees had no power cut down; and prayed he might be permitted to take off the timber, allowing for what damage he did the estate. Although it was objected that the plaintiff might die before the trust was performed, and till then could not be let into possession; therefore to decree that he in the mean time might take off the timber would be a prejudice to his sons; yet the Court decreed a commission to go, to take off timber for the plaintiff's relief and support, not exceeding 500*l*.

Bewick v.
Whitfield,
3 P.Wms. 267.

50. A. was tenant for life, remainder, as to one moiety, to B. in tail, and as to the other moiety to an infant. There was timber upon the premises greatly decaying, whereupon B. the remainder-man brought a bill, praying that the timber which was decaying might be cut down, and that B. and the infant might have the money. The tenant for life insisted on having a share of the money.

Lord Talbot said, 1. The timber while standing was part of

the inheritance: but when severed, either by the act of God, as by tempest, or by a trespasser, belonged to him who had the first estate of inheritance in fee or in tail, who might bring trover for it. 2. The tenant for life ought not to have any share of the money arising from the sale of the timber: but since he had a right to what might be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage was done to the tenant for life on the premises ought to be made good to him. 3. With regard to the timber plainly decaying, it was for the benefit of the persons entitled to the inheritance that it should be cut down, otherwise it was of no value: but this should be done with the approbation of the Master; and trees, though decaying, if for the defence and shelter of the house, or for ornament, should not be cut down. B. to have one moiety of the money, and the other moiety to go to the infant.

51. It has been usual, from very ancient times, where estates for life are expressly limited, to insert a clause that the tenant for life shall have the lands, "without impeachment of waste;" which words were originally held to exempt the tenant for life from the penalties of the statute of Marlbridge only; not to give the property of the thing wasted. But it is laid down by Lord Coke that the words *absque impetitione vasti*, that is, without challenge or impeachment of waste, enable the tenant for life to cut down timber, and convert it to his own use. Otherwise, if the words were, "without impeachment of any action of waste;" for then the discharge would extend to the action only, and not to the property of the timber.

52. To the words, "without impeachment of waste," are sometimes added, with full liberty to commit waste. And in some instances words of restriction are inserted, as voluntary waste in houses only excepted. In the case of *Garth v. Cotton*, which will be stated hereafter, the words were, "without impeachment of waste, except voluntary waste." And Lord Hardwicke held that there the tenant was punishable for wilful waste; and had no interest in the timber, otherwise than the mast and shade, and necessary botes. But some eminent lawyers have lately held that the words voluntary waste only extend to houses, and not to timber trees.

53. It has been lately held that the words without impeach-

Vide Lee v. Alston,
1 Bro. C.C. 195.

Of the Clause,
"without impeachment of waste."

1 Inst. 22. a.
11 Rep. 82. b.

1 Ves. 265.

Tit. 16. c. 7.

Wickham v. Wickham,
19 Ves. 419.

ment of waste, other than wilful waste, only gave to the tenant for life the interest of the money produced by the sale of decaying timber, cut by order of the Court.

Anon. Mos. R.
238.
Pyne v. Don,
1 Term R. 55.
Smythe v. S.
2 Swanst. 251.

54. It has been long fully settled that the words without impeachment of waste give to the tenant for life the right to fell timber, and also the property of all timber trees felled, (n) or blown down; and also of all timber, parcel of a building blown down. It has however been held, in a modern case, that a tenant for life, without impeachment of waste, cannot maintain trover for timber cut during the existence of a prior estate; but that it vests immediately in the owner of the inheritance.

Pigot v.
Bullock,
1 Ves. Jun. 479.

Bray v. Tracy,
W. Jones 51.

55. Where a tenant for life, without impeachment of waste, makes a lease for years, and the lessee commits waste; no action of waste will lie against him. For the lease is derived out of an estate privileged; and if waste lay, it must be against the tenant for life, who made the lease; and he was punishable.

Tit. 2. c. 1.
s. 32.

56. The power which a tenant for life without impeachment of waste has over his estate, with respect to cutting down timber, must be exercised during his life; and cannot be delegated to any other person, so as to enable such person to execute it after his death.

3 Atk. 210.
756.

57. Lord Hardwicke has said, that where there is tenant for life restrained from waste, remainder to another for life, without impeachment for waste; the Court of Chancery will not suffer any agreement between the two tenants for life, to commit waste, to take place, prior to the period at which the second tenant for life's power properly commences.

2 Atk. 383.

58. A tenant for life, without impeachment of waste, is notwithstanding obliged to keep tenants' houses in repair, unless the charge is excessive; and shall not suffer them to run to ruin.

How far re-
strained in
equity.

59. The clause without impeachment of waste is however so far restrained in equity, that it does not enable a tenant for life to commit malicious waste, so as to destroy the estate; which is

(n) [The tenant for life is not entitled to the timber until actually felled, he cannot convey it to another, nor does an authority by him given to another to cut down timber convey any interest, and if not executed in his life time, is revoked by the death of the party giving it. *Cholmeley v. Paxton*, 3 Bing. 207. See also *Wolf v. Hill*, 2 Swan. 149 note.]

called equitable waste ; for in that case the Court of Chancery will not only stop him by injunction, but will also order him to repair, if possible, the damage he has done.

60. Lord Bernard, on the marriage of his son, settled Raby Castle on him for life, without impeachment of waste, remainder to his son for life, &c. Afterwards Lord B., having taken some dislike to his son, got 200 workmen together, and stripped the castle of the iron, lead, doors, &c. to the value of 3000*l*. Vane v. Lord Bernard,
2 Vern. 738.

The Court of Chancery immediately granted an injunction to stay committing of waste, in pulling down the castle ; and, upon the bearing of the cause, decreed not only the injunction to continue, but that the castle should be restored to its former condition. Rolt v. Somerville,
2 Ab. Eq. 759.

61. The Court of Chancery will also restrain a tenant for life, without impeachment of waste, from cutting down timber, serving for shelter or ornament to a mansion-house ; as also timber not fit to be felled.

62. A bill was brought by a remainder man to restrain a tenant for life, without impeachment of waste, from cutting down timber which served as ornament or shelter to the mansion-house, or which was unfit to be felled. Lord Hardwicke granted an injunction to restrain the defendant from cutting down trees standing in lines, avenues, or ridings in the park. Packington v. Packington,
3 Atk. 215.
Aston v. Aston,
1 Ves. 264.
O'Brien v. O'Brien,
Amb. 107.

63. An injunction was moved for to restrain Mr. Bowes, the husband of Lady Strathmore, who was tenant for life, without impeachment of waste, from cutting trees in the rides or avenues to the house, or that served for shade or ornament, or were unfit to be cut as timber. Strathmore v. Bowes,
2 Bro. C.C. 88.

Lord Kenyon (M. R.) granted the injunction, saying it ought to include every thing useful or ornamental to the house ; and said he thought himself bound to grant it as to the ornamental trees, though they should not be planted trees, but growing naturally ; also to extend it to young saplings, and trees not fit to cut as timber. Downshire v. Sands,
6 Ves. 108.
Tamworth v. Ferrers,
Id. 419.
Day v. Merry,
16 Ves. 375.
Coffin v. Coffin,
Mad.&Geld.17.

64. The Court of Chancery will not, however, in cases of this kind, give any satisfaction to the remainder man for timber actually cut down. Rolt v. Somerville,
2 Ab. Eq. 759.

65. The Court of Chancery will not permit a tenant for life, without impeachment of waste, to commit double waste.

66. Lord Archer being tenant for life, without impeachment Plymouth v. Archer.
1 Bro. C.C. 159.

of waste, of an estate which was decreed to be sold, and the money invested in the purchase of another estate, to be settled to the same uses, cut down timber.

Lord Thurlow held that Lord Archer's personal representatives were bound to account for the timber cut : for as Lord A. was to be tenant for life, without impeachment of waste, of the estate to be purchased, if he might commit waste upon the other estate, before it was sold, he would have the benefit of double waste.

Burges v.
Lamb,
16 Ves. 174.

Is annexed to
the privity of
estate.

11 Rep. 83. b.

Partial powers
to do waste.

Hewit v.
Hewit.
Amb. 508.
2 Eden's R. 332.

Chamberlain
v. Dummer,
1 Bro. C.C. 166.
3—549.

Waste by
ecclesiastics,
ante, c. 1. s. 55.

Vin. Ab. Tit.
Dilapidation.

67. The privileges given to a tenant for life, by the words, without impeachment of waste, are annexed to the privity of estate, and determine with it. Thus it is said that if a lease be made to one for the term of another's life, without impeachment of waste, the remainder to him for his own life, he becomes punishable for waste ; for the first estate is gone and drowned.

68. Some cases have arisen where estates for life have been given, with partial powers of committing waste ; and the Court of Chancery has interposed to restrain the tenants from exceeding such powers.

69. Lands were devised to a person for life, with power to cut down such trees as four persons named in the will should allow of, or direct by writing. All these persons being dead, it was decreed that power of cutting down timber remained : but the Court would preserve the check. It was referred to the Master to see what trees were fit to be cut down.

70. Mr. Dummer devised his estate at C. to his wife for life. In a codicil he said, " Whereas by my will my wife cannot cut any timber, now my will and mind is, that she may, during so long time as she continues my widow, cut timber, for her own use and benefit, at seasonable times in the year."

Mrs. Dummer began to fell timber ; the person in reversion applied for an injunction. Lord Thurlow utterly rejected the idea that Mrs. Dummer was only to cut timber for her own use, or for estovers ; and thought her entitled to cut, not only such timber as would suffer by standing, but every thing which could fairly be called timber ; although she could not cut such sticks as would only make paling, or saplins not proper to be cut as timber.

71. Bishops, rectors, parsons, vicars, and other ecclesiastical persons, being considered in most respects as tenants for life of the lands which they hold *jure ecclesiæ*, are disabled from com-

mitting any kind of waste; and if they cut down trees, unless for reparations, they are punishable in the ecclesiastical courts, and also by writ of prohibition.

72. By the statute 35 Edw. 1. it is declared, that parsons shall not presume to fell trees growing in the church-yard, but when the chancel or the body of the church requires reparations. And Lord Coke has cited a case where, upon complaint to the king in parliament, that the Bishop of Durham had committed waste by destroying timber, a prohibition had issued against him. In another case, he is reported to have said, that if a bishop cut down and sold trees, and did not employ them for reparation, and any one would move it, he would grant a prohibition out of the King's Bench.

11 Rep. 49. a.

Stockman v.
Wither,
Roll. Rep. 86.

73. The authority of this *dictum* has been doubted in a modern case, in which the Court of Common Pleas held that it had no power to issue an original writ of prohibition, to restrain a bishop from committing waste, in the possessions of his see, at least at the suit of an uninterested person; and doubted whether even the Court of King's Bench had such a power.

Jefferson v.
Ep. Durham,
1 Bos & Pul.
105.

74. It appears, however, that the Court of Chancery has long exercised this kind of jurisdiction: for there is a case stated in 2 Roll. Ab. 813, in which Lord Keeper Coventry granted a prohibition, at the suit of a patron, against a prebendary, for having wasted the trees of his prebend; and this doctrine is now fully established.

Ackland v.
Atwell.

75. The patron of a living moved for an injunction against the rector to stay waste, in cutting down timber in the church-yard. Lord Hardwicke said, that a rector might cut down timber for the repairs of the parsonage-house, or the chancel, but not for any common purpose: and this he might be justified in doing under the statute 35 Edw. 1. stat. 2; that by the custom of the country he might cut down underwood for any purpose; but if he grubbed it up, it was waste. He might cut down timber likewise for repairing any old pews that belonged to the rectory; and was also entitled to botes for repairing barns and outhouses belonging to the parsonage. The injunction was granted.

Strachy v.
Francis,
2 Atk. 217.

76. A bill was brought by a patron against a rector to stay waste in digging stones, &c. on the glebe, other than what was necessary for repairing and improving the rectory; and for an

Knight v.
Moseley.
Amb. 176.

account of what had been dug and sold. The defendant demurred as to the account; as also to the staying the digging of stones, other than for repairs and improvements; and by way of answer set out that the quarries were opened before.

Rutland's case,
1 Lev. 107.
contra.

The Court said, the parson had a fee simple qualified, under restrictions, in right of the church: but he could not do every thing that a private owner of an inheritance could; he could not commit waste; nor open mines, but might work those already opened. Even a bishop could not. Talbot, bishop of Durham, applied to parliament to enable him to open mines: but it was rejected. Parsons may fell timber, or dig stones to repair: they have also been indulged in selling such timber or stone, where the money has been applied in repairs. Injunctions have been granted even against bishops, to restrain them from felling large quantities of timber, at the instance of the Attorney-General, on behalf of the crown, the patron of bishoprics. If the demurrer had only gone to an account, it had been good; for the patron cannot have any profit from the living: but it was too general, and must be over-ruled.

Hoskins v.
Featherstone,
2 Bro.C.C.552.

77. In a modern case Lord Thurlow granted an injunction to stay waste, against the widow of a rector, during the vacancy, at the suit of the patroness.

Jones v. Hill,
Carth. 224.
3 Lev. 268.

78. It was resolved in 4 Will. and Mary, that an action on the case for dilapidations might be sued against a late incumbent who had resigned a benefice, or against the personal representatives of a deceased rector or vicar, by the successor. And in a modern case it was held that an action for dilapidations also lay for the neglect of repairing a prebendal house, by a succeeding prebendary, against his predecessor, or his personal representative.

Radcliffe v.
D'Oyley,
2 Term Rep.
630.

Tit. 32. c. 2.

79. By the statute 56 Geo. 3. c. 52. the incumbents of any benefice, with the consent of the patron and the bishop, are enabled to pay the monies to arise by sale of any timber cut from the glebe lands of such benefice, either for equality of exchange, or for the price of any house or lands purchased by them, under the authority of a statute which will be stated hereafter.

Of accidents by
fire.

80. At common law tenants for life were not answerable for damages done by fire, whether it arose from accident or negligence. When the statute of Gloucester rendered tenants for life answerable for waste, without any exception, it rendered

them responsible for all damages done by fire. But now, by the statute 6 Ann. c. 31. s. 6. it is enacted, "That no action, suit, or process whatsoever, shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompence be made by such person for any damage suffered or occasioned thereby; any law, usage, or custom to the contrary notwithstanding." By the 7th section of this statute it is provided, that nothing in this act shall defeat any contract or agreement made between landlord and tenant.

81. In consequence of this last clause it has been determined that where a tenant for life under a settlement covenanted to keep a house in good and sufficient repair, and the house was burnt down by accident, he was bound to rebuild it. Chesterfield
v. Bolton,
2 Com. R. 626.

82. It is now become usual, where the intention of the parties is that the tenant shall not be liable to rebuild in case of accidental fire, to except it in the covenant to repair. 6 Term Rep.
651.

TITLE IV.

*Estate Tail after Possibility of Issue extinct.*SECT. 1. *How it arises.*8. *It has some Qualities of an Estate Tail.*9. *But it is in fact only an Estate for Life.*SECT. 10. *This Tenant has the property of the timber.*12. *But is restrained from Malicious Waste.*16. *His Privileges not grantable over.*

SECTION I.

How it arises.

WE now come to treat of those estates for life which are derived from the operation of some principle of law. Of these the first is called an estate tail after possibility of issue extinct; which is thus described by Littleton: "Where tenements are given to a man and to his wife in especial tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct."

s. 32.

Idem.

2. "So if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit, by force of the entail, then the surviving party is tenant in tail, after possibility of issue extinct."

Id. s. 33.

3. "Also if tenements be given to a man and to his heirs which he shall beget on the body of his wife; in this case the wife hath nothing in the tenements, and the husband is seised as donee in special tail: and in this case, if the wife die without issue of her body, begotten by her husband, then the husband is tenant in tail after possibility of issue extinct."

Littleton, s. 34.

4. "And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees, or the donee in especial tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because always during his life he may by possibility have issue, which may inherit by

force of the same entail. And in the same manner the issue which is heir to the donees in especial tail cannot be tenant in tail after possibility of issue extinct, for the reason above-said."

5. Nothing but a moral impossibility of having issue can give rise to this estate. Thus if a person gives lands to a man and his wife, and to heirs of their two bodies, and they live to a hundred years, without having issue, yet they are tenants in tail; for the law sees no impossibility of their having issue. 1 Inst. 28. a.

6. The impossibility of having issue must proceed from the act of God, and not from the act of the parties. For if lands be given to a man and his wife, and to the heirs of their two bodies, and after they are divorced, *causâ præcontractûs*, or *consanguinitatis*, their estate of inheritance is turned to a joint estate for life; and although they had once an inheritance in them, yet for that the estate is altered by their own act, and not by the act of God, *viz.* by the death of either party without issue, they are not tenants in tail after possibility of issue extinct. Idem.

7. A person may be tenant in tail, after possibility of issue extinct, of an estate in remainder, as well as of an estate in possession. Thus if a lease be made to A. for life, remainder to B. and his wife, in special tail; and B. dies without issue, his widow will immediately become tenant in tail after possibility of issue extinct. Bowles's case,
11 Rep. 81. a.

8. This estate, though strictly speaking not more than an estate for life, partakes in some circumstances of an estate tail. For a tenant in tail after possibility of issue extinct, has eight qualities or privileges in common with a tenant in tail. — 1. He is dispunishable for waste, because he continues in by virtue of the livery upon the estate tail; and having once had the power of committing waste, he shall not be deprived of it by the act of God. 2. He shall not be compelled to attorn. 3. He shall not have aid of the person in reversion, because he having originally the inheritance by the first gift, has likewise the custody of the writings, which are necessary to defend it. 4. Upon his alienation no writ of entry *in consimili casu* lies. 5. After his death no writ of intrusion lies. 6. He may join the mise in a writ of right, (a) in a special manner. 7. In a *præcipe* brought by Has some
qualities of an
Estate tail
1 Inst. 27. b.
2 Inst. 302.
1 Roll. R. 184.
11 Rep. 80. a.

(a) These writs are abolished after the 1st day of June 1835, by stat. 3 and 4 Will. c. 27. s. 36, 37.

him, he shall not name himself tenant for life. 8. In a *præcipe* brought against him, he shall not be named barely tenant for life.

But is in fact
only an estate
for life.
1 Inst. 27. b.
11 Rep. 80. b.

9. There are, however, four qualities annexed to this estate, which prove it to be, in fact, only an estate for life.—1. If this tenant makes a feoffment in fee, it is a forfeiture; because having no longer a descendible estate in him, he cannot transfer such an estate to another, without the prejudice and disherison of the person in remainder. 2. If an estate in tail or in fee in the same lands descends upon him, the estate tail after possibility of issue extinct is merged. (b) 3. If he is impleaded, and makes default, the person in reversion shall be received, as upon default of any other tenant for life. 4. An exchange between this tenant and a bare tenant for life is good; for, with respect to duration, their estates are equal.

This tenant has
the property of
the timber.
4 Rep. 63. a.

10. It is said in *Herlakenden's case*, that if a tenant in tail, after possibility of issue extinct, fells the trees, the lessor shall have them; for inasmuch as he has but a particular estate for life in the land, he cannot have an absolute interest in the trees: but he shall not be punished in waste, because his original estate was not within the statute of Gloucester. This is denied by Lord Coke, who is reported to have said, that at common law this tenant had a fee, and consequently full power to fell and dispose of the trees; and notwithstanding the statute *De Donis* had made the estate to be only for life, yet the privilege and liberty was not taken away.

1 Roll. Rep.
184.

11 Rep. 81. a.

11. In *Lewis Bowles's case*, the Court observed that tenants in special tail, at the common law, had a limited fee simple; and when their estate was changed by the statute *De Donis*, yet there was not any change of their interest in doing of waste; so when, by the death of one donee without issue, the estate is changed, yet the power to commit waste, and to convert it to his own use, was not altered nor changed, for the inheritance which was once in him. And in a modern case Lord Eldon held, upon

Williams v.
Williams,
15 Ves. 419.
12 East. 209.
3 Mad. 519.

(b) [It has been doubted whether any merger will take place between an estate tail after possibility of issue extinct, and an estate for life, because the former, though equal in quantity, is greater in quality than the latter; *Bowles v. Bertie*, Rol. Rep. 178. *Lewis Bowles's case*, 11 Co. 81; but the more prevailing opinion seems to be that for all the purposes of merger, this estate is to be considered as a mere estate for life, and susceptible of merger as such. 2 *Preston's Conveyancing*, 3 Ed. 222. Co. Lit. 41. b. 42. a. Bro. Abr. Estate, 25.]

the authority of the preceding cases, that tenant in tail after possibility, being punishable for waste by law, has equally with tenant for life, without impeachment of waste, an interest and property in the timber.

12. The Court of Chancery, by analogy to the rule adopted in the case of tenant for life, without impeachment of waste, will restrain persons seised of estates tail after possibility of issue extinct from pulling down houses, cutting down trees planted for shelter or ornament, or any other kind of malicious waste.

But is restrained from malicious waste.

2 Ch. Ca. 32.

13. A woman being tenant in tail after possibility of issue extinct, and having married again, her second husband felled some trees in a grove that grew near, and was an ornament to, the mansion-house. Having an intent to fell the rest, the person in remainder preferred his bill to restrain her from felling those trees. The Court discovered a strong inclination to grant the injunction : but the case was referred.

Abraham v. Bubb,
2 Freem. 53.
2 Show. 68.

14. A woman, tenant in tail after possibility of issue extinct, was restrained from committing waste, in pulling down houses, or felling trees, which stood in defence of the house ; and also fruit trees in the garden. But for some turrets of trees which stood a land's length or two from the house, the Court would grant no injunction, because she had by law power to commit waste ; and yet she was restrained in the particulars aforesaid, because that seemed malicious.

Anon.
2 Freem. 278.

15. On a motion for an injunction to stay a jointress, tenant in tail after possibility of issue extinct, from committing waste, it was urged that she being a jointress within the statute 11 Hen. 7. ought, in equity, to be restrained from cutting timber, that being part of the inheritance, which by the statute she was restrained from alienating. The Court granted an injunction against wilful waste in the site of the house, and pulling down houses.

Cook v. Whalley, 1 Ab. Eq. 400.

16. The privileges which this tenant enjoys arise from the privity of estate, and because the inheritance was once in him ; therefore if he grants over his estate to another, his grantee will be bare tenant for life.

His privileges not grantable over.
1 Inst. 28. a.

17. Thus where a tenant of this kind granted over his estate, the grantee was compelled to attorn as a bare tenant for life ; and so to be named in a *quid juris clamat*. For although it were

Apreece's case,
3 Leon. 241.

true that a tenant of this kind was not compellable to attorn yet that was a privilege annexed to his person, not to the estate: but by the assignment, the privity was altered, and the privilege gone.

3 & 4 Will. 4.
c. 74.

18. [The powers of disposition given by the late statute for abolishing fines and recoveries do not extend to tenants in tail, after possibility of issue extinct, who are expressly exempted from the operation of the act, by sect. 18.]

TITLE V.
CURTESY.

CHAP. I.

Origin of Estates by the Curtesy, and Circumstances required to their Existence.

CHAP. II.

Of what Things a Man may be Tenant by the Curtesy, and the Nature of this Estate.

CHAP. I.

Origin of Estates by the Curtesy, and Circumstances required to their Existence.

SECT. 1. *Origin of Curtesy.*

4. *Circumstances required.*
5. I. *Marriage.*
6. II. *Seisin.*
15. III. *Issue.*
16. *Who must be born alive.*
17. *In the Lifetime of the Wife.*

SECT. 19. *And be capable of inheriting the Estate.*

24. IV. *Death of the Wife.*
25. *Curtesy in Gavel-kind.*
26. *Who may be Tenants by the Curtesy.*

SECTION I.

THE second estate for life, derived from the common law, is that which a husband acquires in his wife's lands by having issue by her; which is called an estate by the curtesy of England. For before issue had, the husband has only an estate during the joint lives of himself and his wife. Origin of curtesy.
1 Inst. 361. a.

2. The law that a husband, who had issue, should retain the lands of his deceased wife during his life, prevailed among all Lindebrog, Ll.
Alleman.
Tit. 92.

the northern nations. And when the customs of the Normans were reduced into writing, this law was inserted among them, and is thus expressed in the Latin translation of the *Grand Coustomier*, c. 121. *Consuetudo enim in Normanniâ ex antiquitate approbata, quod si quis uxorem habuerit ex quâ hæredem aliquum procreaverit, quem natum vivum fuisse constituerit, sive vivat, sive decesserit, totum feodum quod maritus possidebat, ex parte uxoris suæ tempore quo decesserit, ipsi marito, quamdiu ab aliis cessabit nuptiis, remanebit.* It is said in Horne's Mirror, to have been established in England by King Henry I. which is extremely probable, as there is a full account of it in the Treatise that bears the name of Glanville, written in the reign of King Henry II.

C. 1. s. 3.

Lib. 7. c. 18.
Bract. 437. b.

2 P.Wms. 703.

Circumstances
required.

I. Marriage.

2 Burn's Eccl.
Law 458.

II. Seisin.

1 Inst. 29. a.

3. An estate by the curtesy of England is thus described by Littleton, s. 35.—“Where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in special tail, and hath issue by the same wife, male or female, born alive; albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life, by the law of England.” And Sir J. Jekyll has observed, that the husband's tenancy by the curtesy has no moral foundation; and is therefore properly called a tenancy by the curtesy of England, that is, an estate by the favour of the law of England.

4. Littleton's description of this estate points out four circumstances as absolutely required to the existence of this estate; namely, I. Marriage. II. Seisin of the wife. III. Issue. IV. Death of the wife.

5. With respect to the marriage, it must be between persons capable of contracting together, and duly solemnized. It should however be observed, that although where a marriage is void, the man does not require a title to curtesy; yet if it be only voidable, and is not annulled during the life of the wife, the husband will be tenant by the curtesy: for a marriage cannot be avoided by the ecclesiastical courts, after the death of either of the parties. With respect to the mode of proving the fact of marriage, it will be stated in the next title.

6. As to the seisin of the wife, or of the husband in right of her, it is a circumstance absolutely required; and with respect to corporeal hereditaments, it must be a seisin in deed. Thus Lord Coke says, if a man dies seised of lands in fee simple, or fee tail general, and they descend to his daughter, who marries,

has issue, and dies before entry, the husband shall not be tenant by the curtesy ; yet in this case the husband had a seisin in law. But if she or her husband had entered during her life, he would have been tenant by the curtesy. Tit. 1.

7. The time when the seisin commences, whether before or after issue had, is immaterial; for if a man marries a woman seised in fee, is disseised, and then has issue, and the wife dies, he shall enter and hold by the curtesy. So if he has issue which dies before the descent of the lands on the wife. 1 Inst. 30. a.

8. If a woman, tenant in tail general, makes a feoffment in fee, and takes back an estate in fee, and marries, has issue, and dies, the issue may in a *formedon* (a) recover the land against his father ; because he is to recover by force of the estate tail, as heir to his mother, and is not inheritable to his father. 1 Inst. 29. b.
n. 3.

Mr. Hargrave has observed upon this passage, that the husband could not have curtesy in respect of the fee, because that was defeated by the son's recovery in the *formedon* ; nor in respect of the tail, because the wife's feoffment, before the marriage, had discontinued it ; consequently there could be no seisin of it during the marriage.

9. It has been stated that the possession of a lessee for years is the possession of the person to whom the inheritance descends, before entry or receipt of rent. Therefore if lands, which are let for years, descend upon a married woman, who lives beyond the day on which the rent became due, without receiving it, yet her husband will be entitled to curtesy. Tit. 1. s. 26.

10. An estate tail descended from her brother to Alice Richardson, who was married, and had issue ; the lands were let on leases for years, and the rents were payable at Michaelmas and Lady-day. The tenants being greatly in arrear, Alice did not receive any of the Lady-day rents, but died four months after that time ; nor did any other person receive rent during her life. The question was, whether her husband was entitled to be tenant by the curtesy. De Grey v.
Richardson.
3 Atk. 469.

Lord Hardwicke said, if Alice had died before Lady-day, there could not have been a doubt of the husband's right to curtesy, because he could do nothing till the rent became due. The only objection arose from the neglect of the husband in not distraining

(a) This writ abolished after the 1st June 1835, by stat. 3 and 4 Will. 4. c. 27. s. 36, 37.

for the rent which became due at Lady-day. The receipt of rent would have amounted to an actual seisin. If the representatives of the brother had received any rent during the life of the wife, it would have been a material objection: but no part of the rent which accrued after the death of the brother was ever received by the wife, or by any other person; so that the possession of the lessee was the possession of the wife; nor could there be any other without making the husband a trespasser. Decreed that the husband was entitled to be tenant by the curtesy.

11. A devise to executors for payment of debts does not prevent the descent of the freshold and inheritance; from whence it follows that, in a case of this kind, there will be curtesy.

Guavara's
case, 8 Rep.
96. a.

Tit. 8. c. 1.

12. A person, who had issue a daughter, devised his lands to his executors for payment of his debts, and until his debts were paid. The executors entered. The daughter married, had issue, and died; afterwards the debts were paid. It was resolved that the husband should be tenant by the curtesy.

1 Inst. 29. a.
32. a.

Tit. 6. c. 3.

13. Where the wife's estate was let for life before the marriage, the husband cannot acquire a seisin thereof, and will therefore not be entitled to curtesy. If a rent be reserved, it seems doubtful whether the husband will be entitled to have curtesy of it: in a similar case, Lord Coke was of opinion that a wife should have dower.

14. With respect to the seisin which is necessary in incorporeal hereditaments, to give a title to curtesy, it will be stated in Title 21 Advowson, and the subsequent Titles.

III. Issue.

15. The third circumstance required to the existence of an estate by the curtesy is issue; after which the husband was formerly allowed to do homage alone, and was called tenant by the curtesy initiate. Such issue must, however, have the following qualities to entitle the husband to curtesy. 1. It must be born alive. 2. In the lifetime of the mother. 3. And be capable of inheriting the estate.

Who must be
born alive.
Brac. 438. a.
1 Inst. 29. b.
8 Rep. 34. b.
Dyer 25. b.

16. By the old law it was deemed necessary that the child should not only be born alive, but be heard to cry; and that circumstance was to be proved by persons who actually heard it, not by those who learned it by hearsay. Littleton, however, appears to have doubted whether it was necessary to prove that the child cried; and Lord Coke deduces an argument from the

form of pleading, in cases of this kind, to prove that any other evidence would be sufficient.

17. The issue must be born in the lifetime of the wife : so that if she dies in childbed, and the issue is taken out of the womb by the Cæsarean operation, the husband will not be entitled to curtesy. For at the instant of the mother's death he was clearly not entitled, as having had no issue born : but the land descended to the child, while in his mother's womb ; and the estate, being once so vested, shall not be taken from him and his heirs.

In the lifetime
of the wife.
1 Inst. 29. b.
3 Rep. 35. a.

18. It is immaterial whether the issue be born before or after the seisin of the wife. Thus if, after issue is born, lands descend to the wife, be the issue dead or alive at the time of the descent, the husband shall be tenant by the curtesy. So if, after the death of the issue, the wife acquires lands in fee, and dies without having had any other issue, her husband shall be tenant by the curtesy. For the having issue, and being seised during the coverture, is sufficient, though it be at several times.

8 Rep. 35. b.

13 Rep. 23.

19. The issue must be such as is capable of inheriting the estate : therefore if lands be given to a woman and the heirs male of her body, who has issue a daughter only, her husband will not be tenant by the curtesy.

And be capable
of inheriting
the estate.
1 Inst. 29. b.
8 Rep. 35. b.

20. If a woman seised in fee simple marries, has issue, and then her husband dies, and she takes another husband, by whom she also has issue ; though the issue by the first husband be living, yet the second husband shall be tenant by the curtesy ; because his issue by possibility may inherit, if the first issue die without issue.

8 Rep. 34. b.

21. If the wife has issue, and after is attainted of felony, so as the issue cannot inherit to her, yet the husband shall be tenant by the curtesy, in respect of the issue born before the felony, which by possibility might then have inherited. But if the wife had been attainted of felony before issue had, although she had issue afterwards, the husband would not be tenant by the curtesy.

1 Inst. 40. a.

[22. In the recent case of *Barker v. Barker* the devise was to A. and her heirs ; but if she died leaving issue, then to such issue and their heirs. A died leaving issue, and it was held that the husband of A. was not entitled to curtesy as the children

2 Sim. 249.

took by purchase, and the wife had not such an estate as could descend upon them.]

Tit. 29. c. 3.

23. It is a rule of law that no person can be heir to an ancestor, unless such ancestor died seised : hence probably arose the doctrine which requires an actual seisin in the wife ; for, without such an actual seisin, her issue would not be capable of inheriting from her.

IV. Death of
the wife.
1 Inst. 30. a.

24. The fourth and last circumstance required to give a title to curtesy is the death of the wife, by which the estate of the husband becomes consummate.

Curtesy in
gavelkind.

2 Rob. Gav. c. 1.
1 Inst. 30. a.
note (1).

25. By the special custom of gavelkind, a husband who survives his wife is entitled to a moiety of her lands, whether he has issue or not ; but which, in conformity to the custom of Normandy, is forfeited by a second marriage. Mr. Robinson, in his Treatise on Gavelkind, observes that this was formerly called the Man's Free Bench ; and cites a record of 21 Edw. 1. in which this custom is recognized.

Who may be
tenants by the
curtesy.

26. As to the persons who are capable of acquiring an estate of this kind, it will be sufficient to observe, that all those who are capable of taking freehold estates may be tenants by the curtesy.

7 Rep. 25. a.
1 Vent. 417.

27. An alien cannot, however, be tenant by the curtesy ; for although he may take an estate by purchase, for the benefit of the crown, yet he cannot take an estate by act of law ; for the law will not transfer an estate to a person who cannot keep it, but must immediately give title to another. If an alien be made a denizen, and afterwards has issue, he may be tenant by the curtesy, in respect of such issue ; though he would not be entitled on account of issue had before.

Bro. Ab.
Curtesy, 15.

28. Persons attainted of treason or felony cannot be tenants by the curtesy ; for, being *extra legem positi*, they are become incapable of deriving any benefit from the law ; and by consequence, of this in particular, which intended to give the inheritance only to those who were capable of holding it during their lives.

CHAP. II.

*Of what Things a man may be Tenant by the Curtesy, and
Nature of this Estate.*

SECT. 1. *Estates in Fee Simple.*

5. *Estates Tail.*
11. *Estates in Coparcenary.*
12. *Trust Estates.*
13. *Money to be laid out in Land.*
15. *Equities of Redemption.*
16. *Incorporeal Hereditaments.*
17. *What Things are not Liable
to Curtesy.*
18. *Estates not of Inheritance.*

SECT. 23. *Estates in Joint-Tenancy.*

23. *Remainders and Reversions.*
24. *Lands Assigned for Dower.*
25. *Copyhold Estates.*
26. *Nature of this Estate.*
31. *Forfeitable for Alienation.*
33. *But not for Adultery.*
34. *This Tenant is Punishable
for Waste.*

SECTION I.

It appears from Glanville, Lib. 7. c. 18., that the right to curtesy was originally confined to the *maritagium* of the wife. But when Bracton wrote, this right was extended to all the lands whereof the wife was seised, whether she acquired them by inheritance, or as a *maritagium*, or by donation. And Littleton's description of curtesy extends to all estates in fee simple.

*Estates in fee
simple.
Bract. 437. b.
8. a.*

2. If a woman, tenant in tail after possibility of issue extinct, takes a husband, has issue, and the fee simple descends upon her, the husband will be entitled to curtesy ; because, by the descent of the fee, the estate tail after possibility was merged ; and the wife became tenant in fee simple executed.

*Bro. Ab. Estate
25.*

3. A man may be tenant by the curtesy of a capital messuage, though it be *caput comitatus*, or *baronia*, as well as of a castle, which serves for the public defence of the realm ; and also of an honour or manor, with all their rights and appurtenances.

1 Inst. 30. b.

4. Where by articles previous to marriage a woman granted to her intended husband, during their joint lives, the interest of her money, and the rents of her estate, of which she was seized in fee, to maintain the house, &c. ; Lord Hardwicke held that this was not intended to abridge the husband's legal rights ; therefore

*Stedman v.
Pulling,
3 Atk. 423.*

that he was entitled to be tenant by the curtesy of the estate whereof his wife was seised at the time of the marriage, as well as to an estate which came to her after.

Estates tail. 5. Before the statute *De Donis* conditional fees were subject to curtesy. And when that statute converted them into estates tail, husbands were allowed to be tenants by the curtesy of them also.

8 Rep. 35. b.
2 Inst. 336.

6. Where lands were given, before the statute *De Donis*, to a man and a woman, and the heirs of their bodies to be begotten, the course of descent was in some degree changed by their having issue; for then the land became descendible to all the heirs of the donee's body, and also liable to the curtesy of a second husband. To prevent this, it was enacted by the statute *De Donis*, that where lands were given in this manner, a second husband should not be tenant by the curtesy.

7. In Littleton's description of curtesy, it is confined to women seised as heirs in special tail. There can be no doubt, however, but that the husband of a woman *donee* in special tail would be also entitled to curtesy.

8. It was formerly doubted whether a man could be tenant by the curtesy of an estate tail, after failure of issue capable of inheriting the estate; by which the estate tail was in fact determined, and the donor's right to the reversion accrued. But it has been resolved that, in a case of this kind, the husband should have his curtesy.

Paine's case,
8 Rep. 34.
1 Inst. 30. a.

9. A man, having issue two daughters, gave lands to the elder, and the heirs of her body; remainder to the younger, and the heirs of her body. The elder daughter married, and had issue born alive, that died; afterwards she herself died. The younger daughter entered upon the husband of the elder, who claimed to be tenant by the curtesy. It was objected that the husband should not in this case be tenant by the curtesy, because the estate of the wife was determined; and the estate of the husband, which was derived out of that of the wife, could not continue longer than the primitive estate endured; for, *cessante statu primitivo, cessat derivativus*. But it was answered and resolved that at common law, if lands had been given to a woman and the heirs of her body, and she had taken a husband, and had issue, and the issue had died, and the wife had died without issue, whereby the inheritance of the land

reverted to the donor; in that case the estate of the wife was determined, and yet the husband should be tenant by the curtesy; for that was *tacitè* implied in the gift: that the husband was, therefore, entitled in this case to hold the estate tail during his life, as tenant by the curtesy. The estate by the curtesy was not derived merely out of the estate of the wife, but was given to the husband by the privilege and benefit of the law; for as soon as the husband had issue, his title became initiate, and could not afterwards be defeated by the death of the issue; which, being the act of God, ought not to turn to his prejudice.

10. Curtesy is an incident so inseparably annexed to an estate tail, that it cannot be restrained by any proviso or condition whatever. 1 Inst. 224. a.
6 Rep. 41. a.

11. A man may be tenant by the curtesy of an estate in fee simple, or in tail, held in coparcenary, or in common with other persons; of which an account will be given under those Titles. Estates in Coparcenary,
Tit. 19. & 20.

12. Although curtesy is a right derived from positive institution, not from any moral principles, yet it is much favoured in equity; for trust estates have been decreed to be subject to curtesy; and the courts of equity will assist a tenant of this kind in removing trust terms for years; of which an account will be given hereafter. Trust estates.

Tit. 18. c. 2.
s. 14, 15, &c.

13. It has been stated to be a rule in equity that money agreed or directed to be laid out in the purchase of land, shall be considered as land to all intents and purposes. And upon this principle it has been held that a man may be tenant by the curtesy of money agreed or directed to be laid out in the purchase of land. Money to be
laid out in land.
Tit. 1. s. 4.

14. A person devised 300*l.* to her daughter Mary, to be laid out by her executrix in the purchase of land, and settled to the only use of her said daughter and her children; if she died without issue, the lands to be equally divided between her brothers and sisters. The plaintiff married Mary the legatee, and had issue by her. She and her children being dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in the purchase of land, and settled on him for life, as tenant by the curtesy, or have the interest of it during his life. Sweetapple
v. Bindon,
2 Vern. 536.

Cunningham v. Moody,
1 Ves. 174.
Dodson v. Hay,
3 Bro. C.C. 404.
S. P.

The Court observed, that if this had been an immediate devise of land, the devisee would have been tenant in tail, consequently the husband would have been tenant by the curtesy. It was, therefore, decreed that the money should be considered as land; and that the plaintiff should have the interest and produce thereof during his life, as tenant by the curtesy.

Equities of Redemption,

15. An equity of redemption of an estate in fee simple which is mortgaged in fee, or for years, has been decreed to be subject to curtesy; of which an account will be given hereafter.

Tit. 15. c. 3.

Incorporeal Hereditaments.

16. Some incorporeal hereditaments, such as advowsons, tithes, commons, and rents, are liable to curtesy; of which an account will be given under those respective titles.

What things are not liable to curtesy.

17. Having stated the different kinds of property which are liable to curtesy, it will now be necessary to enquire what things are not subject to this right.

Estates not of Inheritance.

Do. Smith v. Jones

18. No estates in land are subject to curtesy, but those of inheritance; for an estate by the curtesy is a continuation of the inheritance; and, therefore, there can be no tenancy by the curtesy, unless the children take the inheritance; for it is absolutely necessary that the moment the husband takes as tenant by the curtesy, the inheritance should descend from the wife to her child or children.

Boothby v. Vernon,
9 Mod. 147.

19. Lands were devised to Ann Boothby and her assigns for her life: if she married, and had issue male of her body living at the time of her death, then to such issue male and his heirs male for ever. Ann Boothby married, had issue, and died in the lifetime of her husband.

See also Roberts v. Dixwell,
Tit. 38. c. 14. s. 69.

It was held that the inheritance never having been vested in the wife during her life, her husband could not be tenant by the curtesy.

Sumner v. Patridge,
2 Atk. 47.
See also Barker v. Barker,
2 Sim. 249.

20. Lands were devised to A. and her heirs; if she died before her husband, he to have 20*l.* a year; the remainder to go to the children. The wife died before her husband. The Court said it was a rule, in the case of a tenancy by the curtesy, that the estate should come out of the inheritance, and not out of the freehold; therefore the husband was not entitled to curtesy.

Doe v. Rivers,
7 Term. R. 276.

21. A woman tenant in tail, previous to her marriage, conveyed her estate, by lease and release, to trustees, to the use of her husband for life, remainder to herself for life, remainder to the first and other sons of the marriage. The woman died in the

lifetime of her husband ; and it was held that the husband did not take any estate under the settlement, because it was not competent to the wife to pass the estate by such a conveyance, to the prejudice of her issue, after her death, and that he did not take an estate by the curtesy ; because the instant the marriage took effect the estate was vested in the husband during the joint lives of himself and his wife ; consequently there never was one moment during the coverture when the wife was seised of an estate tail in possession ; which was necessary, in order to make the husband tenant by the curtesy.

Tit. 2. c. 2.
s. 24.

22. Estates in fee or in tail, which are held in joint-tenancy, are not subject to curtesy ; of which the reason will be given in that title.

Estates in
Joint-tenancy.
Tit. 18.

23. Lord Coke says, a man shall not be tenant by the curtesy of a remainder or reversion expectant upon an estate of freehold, unless the particular estate be determined during the coverture. But a man is entitled to curtesy of a reversion expectant on an estate for years, because the wife was seised of a freehold.

Remainders
and Reversions.
1 Inst. 29. a.

Ante, c. 1. s. 10.

24. A man cannot be tenant by the curtesy of lands which are assigned to a woman for her dower ; of which the reasons will be given in the next title.

Lands assigned
for Dower.

25. Copyhold estates are not liable to curtesy by the common law : but there are many manors in which the husband of a female copyholder is, by particular custom, entitled to his wife's estate, if he survives her, of which an account will be given in a future title. A man may, however, be tenant by the curtesy of the rents and services due for copyholds, where his wife was seised of the manor of which they are held.

Copyhold
Estates.

Tit. 10.

26. An estate by the curtesy is no more than a bare estate for life ; nor has this tenant any more privileges than a mere tenant for life. By the custom of Normandy, it was determinable upon the second marriage of the tenant ; which, we have seen, is still the case in gavelkind lands.

Nature of this
Estate.

27. An estate by the curtesy is considered in many respects as a continuation of the wife's estate ; therefore the husband is entitled to all those rights and privileges which his wife would have had if she were alive, and which were annexed to her estate.

3 Rep. 22. b.

28. No entry is necessary to complete this estate ; for on the death of the wife, the law adjudges the freehold to be in the husband immediately, as tenant by the curtesy.

Bro. Ab.
Præcipe, 38.

1 Atk. 606.

29. Where an estate, of which a man is tenant by the curtesy, is charged with the payment of a sum of money; the person entitled to the inheritance can oblige the tenant by the curtesy to keep down the interest, as well as any other tenant for life.

2 Inst. 301.
8 Rep 36. a.

30. The tenant by the curtesy shall be attendant on the lord paramount for the services due in respect of the lands that he holds by this title.

Forfeitable for
Alienation.
2 Inst. 309.

31. If a tenant by the curtesy aliens in fee, or in tail, or for the life of the grantee it is a forfeiture of his estate: and the person in reversion may, by the Stat. of Westminster 2. c. 24. have a writ of entry, *in consimili casu*.

Tit. 32. c. 25.

32. Tenants by the curtesy are restrained by the Stat. of Gloucester, 6 Edw. 1. c. 1. from barring the heirs of their wives, by warranty without assets.

But not for
Adultery.
3 P. Wms. 276.

33. A husband does not forfeit his right to an estate by the curtesy, by leaving his wife, and living in adultery with another woman.

This Tenant is
punishable for
Waste.
2 Inst. 145,
301, 353.

34. It appears to have been doubtful whether a tenant by the curtesy was punishable at common law for waste. It was therefore enacted by the Stat. of Gloucester, 6 Edw. 1. c. 5. that a writ of waste might be brought against him, and that he should incur the same penalties for committing waste as any other tenant for life.

Sup. p. 120. n.

2 Inst. 301.
2 Bac. Ab.
8vo. p. 230.

35. There is such a privity of estate between the tenant by the curtesy and the heir, that at common law, although both had, as it were by consent, granted away their estates, yet no action of waste lay against any other than the tenant by the curtesy; nor against him, by any other than the heir at law. By the Statute of Gloucester, c. 5. a remedy is provided for the grantee of the reversion, against a tenant by the curtesy, so long as he continues his estate; or against his assignee. But while the heir keeps his reversion, the tenant by the curtesy is liable to his action of waste, notwithstanding any assignment; the statute having provided no remedy for this case.

1 Inst. 57. a.
n. 1.
Tit. 3. c. 2.

36. It appears somewhat doubtful whether tenant by the curtesy is within the statute 6 Anne, c. 31. respecting accidental fire.

TITLE VI.
D O W E R.

CHAP. I.

Origin and Nature of Dower.

CHAP. II.

Of what Things Dower may be, and Nature of this Estate.

CHAP. III.

Assignment of Dower, and Modes of recovering it.

CHAP. IV.

What will operate as a Bar or Satisfaction of Dower.

CHAP. I.

Origin and Nature of Dower.

SECT. 1. *Origin of Dower.*

5. *Dower at Common Law.*

7. *Dower by Custom.*

11. *Circumstances required.*

12. I. *Marriage.*

14. *How proved.*

15. *Effect of Divorces.*

19. II. *Seisin of the Husband.*

SECT. 26. *Seisin of Gavelkind Lands.*

27. III. *Death of the Husband.*

28. *Who may be endowed.*

29. *Who are incapable of Dower.*

30. *Aliens.*

32. *Jewesses.*

33. *Women Stolen.*

SECTION I.

THE third estate for life, derived from the law, is that which a widow acquires in a certain portion of her husband's real property, after his death, for her support and maintenance. It is called Dower, and is derived from the Germans, among whom it was a rule that a virgin should have no marriage portion, but

Origin of
Dower.

that the husband should allot a part of his property for her use, in case she survived him. Thus Tacitus says,—*Dotem non uxori marito, sed uxori maritus offert*. And when the Germans established themselves in the southern parts of Europe, and reduced their customs into writing, they fixed the portion of the husband's lands, which he might allot for his wife's dower. The Longobardic code directed that it should consist of a fourth part, the Gothic of a tenth; and in process of time regular forms were invented for the purpose of constituting dower.

Du Cange
Voce Dos,
Baluz. Form.
Vol. II. 414.
937.
Maculp. Form.
c. 15.

Lindebrog,
Ll. Sax. Tit. 7.

2. The Saxons, like all the other German nations, were well acquainted with the custom of dower; for it appears from the laws of King Edmund, that a widow was entitled to a moiety of her husband's property, for her life; but which she forfeited by a second marriage. In the Appendix to Somner's Gavelkind, there is a Saxon charter, intituled *Chirographum Pervetustum de Nuptiis contrahendis, et Dote Constituendâ*, in which particular lands, together with thirty oxen, twenty cows, ten horses, and ten bondmen, are appointed for the wife's dower. It is not known whether the Conqueror made any alteration in the Anglo-Saxon customs respecting dower; so that it probably continued to consist of a moiety of the husband's lands, upon condition that the widow remained chaste and unmarried. But by the charter of King Henry I. this condition of chastity and widowhood was only required where there was issue.

Lib. 6. c. 1,
2, &c.

3. The law of dower, appears however, to have been altered in the reign of King Henry II.; for Glanville states it thus. Every man was bound, both by the civil and ecclesiastical law, to endow his wife at the time of his marriage; either by naming the dower in particular, or by endowing her generally of all his lands. If he endowed her generally, then the wife was entitled to her *dos rationabilis*, which was one-third of her husband's freehold. If he named a dower which amounted to more than a third, it was not allowed, but was reduced to a third. Nor was the wife entitled to dower out of any of her husband's subsequent acquisitions, unless he specially engaged before the priest to endow her of them. And these regulations are exactly similar to those contained in the *Grand Coustumier* of Normandy.

c. 101.

4. Nothing is mentioned in King John's Magna Charta, or the first charter of Henry III. respecting dower: but in the charters of 1217 and 1224, it is declared that dower should con-

sist of a third of all the lands which the husband held during his life, unless the wife had been endowed of a smaller portion at the church door. (a) *Assignetur autem ei pro dote sua, tertia pars totius terræ mariti sui, quæ fuit sua in vitâ sua, nisi de minori fuerit dotata ad ostium ecclesiæ.*

Blackst.
Charters.
2 Inst. 16.

5. Dower at common law is thus described by Littleton, s. 36.—“Tenant in dower is where a man is seised of certain lands and tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth; the wife, after the decease of her husband, shall be endowed of a third part of such lands and tenements as were her husband's at any time during the coverture; to have and to hold to the same wife in severalty, by metes and bounds, for term of her life; whether she hath issue by her husband or no, and of what age soever the wife be, so as that she be past the age of nine years, at the time of the death of her husband.”

Dower at com-
mon law.

6. It has been stated that curtesy is founded on positive institutions; but dower is not only a civil, but also a moral right. Thus Sir Joseph Jekyll says, “the relation of husband and wife, as it is the nearest, so it is the earliest; and, therefore, the wife is the proper object of the care and kindness of the husband. The husband is bound by the law of God and man to provide for her during his life; and after his death the moral obligation is not at an end, but he ought to take care of her provision during her own life. This is the more reasonable, as, during the coverture, the wife can acquire no property of her own. If before her marriage she had a real estate, this by the coverture ceases to be her's; and the right thereto, while she is married, vests in her husband. Her personal estate becomes his absolutely, or at least is subject to his control; so that unless she has a real estate of her own (which is the case of but few,) she may by his death be destitute of the necessities of life; unless provided for out of his estate, either by a jointure, or dower. As to the husband's personal estate, unless restrained by special custom, which very rarely takes place, he may give it all away from her. So that his real estate, if he has any, is the only plank she can lay hold of to prevent her sinking under her distress. Thus the wife is said to have a moral right to dower.”

Dower is a
moral right.
2 P.Wms. 702.

(a) [Assignment of Dower *ad ostium ecclesiæ* or *ex assensu patris* are now abolished by stat. 3 & 4 Will. 4. c. 105. s. 13.]

Dower by custom.

7. Dower by custom is where a widow becomes entitled to a certain portion of her husband's lands, in consequence of some local and peculiar custom. And in cases of this kind the widow cannot waive the provision thereby made for her, and claim dower at common law, because all customs are equally ancient with the common law.

Rob. Gav. 159.
17 Ed. 2. st. 1.
c. 16.

8. Thus by the custom of gavelkind, the widow is entitled to a moiety of all the lands and tenements which her husband held by that tenure, [and of which he was seized at any time during the coverture.] This was formerly called free bench, and is forfeitable by a second marriage, or by the having a bastard child. And it is observable, that this species of dower is exactly similar to that which existed in the time of the Saxons.

Lambard Arch.
60.

Lit. s. 166.

9. By the custom of some burroughs, the wife shall have for her dower all the tenements that were her husband's; which is also called free bench.

Tit. 10. ch. 8.

10. By the custom of most manors of which lands are held by copy of court roll, the widows of copyholders are entitled to a certain part, and sometimes to the whole, of their husband's lands, as their dower or free bench.

Circumstances
required.

11. Littleton's description of dower at common law points out three circumstances as absolutely necessary to create a title to dower; namely, marriage, seisin, and death of the husband.

1. Marriage.

1 Inst. 32. a.

1d. 33. a.

12. With respect to the marriage, it must be between persons capable of contracting together, and duly celebrated; for it is a maxim of law, *ubi nullum matrimonium, ibi nulla dos*; and although the marriage be had before the parties are of sufficient age to consent; yet if the wife be past the age of nine years, at the time of her husband's death, she shall be endowed, of what age soever her husband be, although he were but four years old. Wherein it is to be observed (says Lord Coke,) that although *consensus, non concubitus, facit matrimonium*, and that a woman cannot consent before twelve years, nor a man before fourteen; yet this inchoate and imperfect marriage, from which either of the parties may, at the age of consent, disagree, shall entitle the wife to dower. Therefore it is accounted in law, after the death of the husband, *legitimum matrimonium quoad dotem*.

4 Geo. 4. c. 76.
5 ib. c. 32.
6 ib. c. 92.

[The common law on the subject of marriages has been altered by various acts, which have been repealed by those now in force

and cited in the margin; but the law of Scotland continues in the particulars above noticed according to the common law. 11G.4.&1Will. 4. c. 18.

Where the parties elope and go to Scotland, and marry there according to the law of that country, and return immediately afterwards, the wife will be entitled to dower. (b) 1 Ersk. Prin. of the Law of Scotland, 62.

Marriages of English subjects celebrated *bona fide* in foreign countries, according to the law of those countries, will also entitle the widows to dower. (c)]

13. It has been stated that though a marriage be voidable, yet if it be not avoided in the lifetime of the parties, it cannot be annulled after. And if a marriage *de facto* be voidable by divorce, whereby the marriage might have been dissolved, and the parties freed *a vinculo matrimonii*, yet if the husband die before any divorce, then, for that it cannot after be annulled, the wife *de facto* will be endowed. Tit. 5. c. 1. 1 Inst. 32. b.

14. In actions for curtesy or dower, the fact of marriage cannot be tried by a jury, but only by the bishop's certificate, upon the plea of *ne unques accouplé in loyal matrimony*. Because the direct jurisdiction in question concerning the legality of marriage belongs to the ecclesiastical courts; and the sentences of those courts, on this head, are in general conclusive to the temporal courts. How proved. Bract. 302. a. Dyer 368. b. Robins v. Crutchley, 2 Wils. R. 123. Ilderton v. Ilderton, 2 H. Black. 145.

15. A divorce *propter zævitiam et metum* is no bar to dower, because it does not dissolve the bond of matrimony; but is only a permission to the parties to live separate, in order that the wife may be secure from the husband's cruelty. Effect of divorces. 1 Inst. 32. a.

16. Lord Coke says, a divorce on account of adultery is no bar to dower, because it does not dissolve the marriage, but only separates the parties *a mensâ et thoro*; and the marriage still remains in force. In Roll's Ab. is the following passage:—"If the wife be divorced for adultery, which does not dissolve the bond of marriage, by the canon law, nor of our church in this realm, but is only *a mensâ et thoro*, yet this shall bar her of her dower." Lord Coke's doctrine, however, is supported by a de- Idem. Tit. Dower P. No. 13.

(b) [Compton v. Bearcroft, Bull. N. P. 113. 2 Hagg. 443, 444. ib. 54. Brook v. Oliver, Rolls, 1759, and Bedford v. Varney, Chancery 1762, cited 2 Hagg. 376, (n.) Exparte Hall, 1 Ves & Bea. 112, 114.]

(c) [Ilderton v. Ilderton, 2 Hen. Black. 145. See also 2 Hagg. 390, 395, 437; also 1 Roper, Husband and Wife, Jacob's Ed. 334, and addenda. Stowell's case, Godb. 145. Noy 108.

Shute v. Shute,
Prec. in Ch.
111.

termination of the Court of Common Pleas in 2 James. There is also another case where a woman, who had been divorced *a mensâ et thoro*, claimed her dower in Chancery. And Sir T. Trevor, M. R. said, "As to dower, whether you are entitled to it, go to law, there being no impediment, and therefore, as to that, the bill must be dismissed." But it does not appear from the report whether the divorce was for adultery.

Infra, c. 4.

17. It has, however, been enacted by the statute of Westm. 2. c. 34. that if a woman elopes from her husband, and lives in adultery, she will thereby lose her dower.

1 Inst. 33. a.

18. A divorce, *causâ præcontractus, consanguinitatis, affinitatis* or *frigiditatis*, bars the wife of dower, because these dissolve the *vinculum matrimonii*, and leave the parties at liberty to marry again. But the marriage must be dissolved in the lifetime of the husband.

II. Seisin of the husband.

Tit. 1.

Perk. s. 366.

Lit. s. 448.

Plowd. 371.

Perk. 367.

19. The second circumstance required to the existence of dower [of any widow who shall have been or shall be married on or before the 1st day of January, 1834 (d)], is, that the husband should be seised some time during the coverture of the estate whereof the wife is dowable. There is, however, no necessity for a seisin in deed, as in the case of curtesy; for a seisin in law will be sufficient, otherwise it would be in the husband's power, either by his negligence or his malice, to defeat his wife of that subsistence after his death, which the law has provided for her; and she cannot enter to gain a seisin in her own right, as her husband may do in lands descended to her, in order to entitle himself to curtesy.

20. Where the ancestor dies seised, and the heir being married dies without making an actual entry on the lands, his widow shall notwithstanding be endowed; for, by the descent of the land upon the heir, he acquired a seisin and freehold in law, though not in deed. It would be the same if, soon after the death of the ancestor, a stranger had entered on the land and abated; for between the death of the ancestor, and the entry of the abator, there was a space of time during which the heir had a seisin in law. If, however, the heir had married after the entry of the abator, and had died without making an entry, his widow would not be entitled to dower; because the seisin in law which he had

(d) [The late Act for the amendment of the law of Dower does not extend to the dower of any widow who shall have been, or who shall be married on or before the above mentioned day. Stat. 3 & 4. Will. 4. c. 105. s. 14.]

acquired, upon the death of the ancestor, was divested by the abatement before the marriage; so that the heir had neither a seisin in law, nor in deed, during the coverture.

21. Where lands are conveyed to a married man by a deed deriving its effect from the statute of Uses, his wife will be entitled to dower, though the husband does not enter; because by the operation of that statute a seisin in deed is transferred. (e) Tit. 11. c. 3.

22. If a man makes a lease for life, reserving rent to him and his heirs, then marries and dies; his wife shall not be endowed of the reversion, because there was no seisin in deed, or in law, of the freehold; nor of the rent, because the husband had but a particular estate therein, and no fee simple. But if a man makes a lease for years, reserving rent, then marries, and dies, his wife shall be endowed, because he continues to be seised of the freehold and inheritance. 1 Inst. 32. a.

23. If a person devises lands to his executors for payment of debts, and after his debts paid to his son in tail, and the son marries, and dies before the debts are paid, his wife shall have dower; because the estate of the executors is only a chattel interest, and the freehold vested in the son, on the death of the father. But the wife's dower will not commence till the debts are paid. 1 Inst. 41. a.
8 Rep. 96. a.
2 Vern. 404.

24. It is laid down by Lord Coke, that of a seisin for an instant, a woman shall not be endowed. This position is thus explained by Sir W. Blackstone:—"The seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the same fine,) such a seisin will not entitle the wife to dower, for the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof." 1 Inst. 31. b.
2 Comm. 131.

25. Sir J. Jekyll has also said, that a woman is not entitled to dower out of an instantaneous seisin. The cognizee of a fine is not so seised as to give his wife a title to dower; nor, in the Broughton v.
Randall.
Cro. Eliz. 503.

1 Atk. 442.
Tit. 35.

(e) [But though the seisin at law of the husband without actual entry will entitle the wife to dower, (Co. Lit. 29. a. Lit. s. 681.) still this seisin as regards the dower of women married before or on the 1 Jan. 1834, must be of a legal and not an equitable estate. 2 Bro. C C. 630. 2 Atk. 526. *Infra*, Tit. 12. ch. 2. s. 16, &c.]

case of a use, has the widow of a trustee any claim to dower from such a momentary seisin in her husband. (f)

Seisin of gavel-kind lands.

26. Lambard, in his Perambulation of Kent, has advanced an opinion, that a seisin in law is not sufficient to entitle a woman to dower of gavelkind lands, because the words of the custom are, — “*De tenements dont son baron mourust vestu et seisi*,” which only extends to lands whereof the husband was actually seised; and customs derogatory to the common law ought to receive a strict construction. But Mr. Robinson has controverted this opinion, and observed, that whatever may be the strict literal sense of the word *vestu*, it can scarce be sufficient to add so unreasonable a qualification to the custom, as that the neglect of the husband in gaining an actual seisin, by entry, shall prejudice his wife, without a strong usage accordingly.

Gavelk. 117.

III. Death of the husband.

27. The last circumstance required to the existence of an estate in dower is the death of the husband, by which the wife's estate is consummate. It is generally said, that nothing but the natural death of the husband will give a title to dower; though there are some authorities to prove that banishment by abjuration of the realm, or by [act of] parliament, which is a civil death, will have the same effect.

1 Inst. 33. b. 132. b.

Who may be endowed.

28. With respect to the persons capable of being endowed, all women who are natural born subjects, and have attained the age of nine years, are by the common law entitled to dower; although their husbands should be but four years old. And Lord Coke says, if a man marries a woman only seven years old, and afterwards aliens his land, and the wife attains the age of

1 Inst. 33. a.

(f) [The observations in the preceding sections on the legal seisin of the husband now only apply to the husbands of women married before, or on the 1st day of January, 1834, for by the late statute 3 & 4 Will. 4. c. 105. sect. 2, 3. widows married since that day are entitled to dower out of equitable estates; the following are the words of the act. That when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint-tenancy) then his widow shall be entitled in equity to dower out of the same land. Sect. 3. That when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced. No mention is made of gavelkind tenure in the above act.

3 & 4 W. 4. c. 27.

nine years, and then the husband dies, she shall be endowed ; for though she was not absolutely dowerable at the time of her marriage, yet she was conditionally dowerable, if she attained the age of nine years before the death of her husband.

29. Notwithstanding the favour which the common law shews to widows, yet there are some cases in which women are disabled from having dower. Who are incapable of dower.

30. Alien women are not generally capable of acquiring dower, for the same reason that an alien man cannot be tenant by the curtesy. But by the *Lex Coronæ*, an alien queen is entitled to dower. And in consequence of a petition from the Commons, an act of parliament was made in 8 Henry 5. not printed among the statutes, by which all alien women who from thenceforth should be married to English men, by licence from the king, are enabled to have dower, after their husbands' death, in the same manner as English women. Aliens.
Tit. 5. c. 1. s. 27.
Jenk. Cent. 1.
ca. 2.

Rot. Parl.
Vol. IV. 128.
130.

31. If an alien woman be naturalized by act of parliament, she then becomes entitled to dower out of all the lands whereof her husband was seised during the coverture. And where an alien woman is created a denizen, she becomes entitled to dower, out of all the lands whereof her husband was seised at the time when she was created a denizen ; but not out of any lands whereof he was seised before, and which he had aliened. 1 Inst. 31. b.
33 a.
13 Rep. 23.

32. If a Jew, born in England, marries a Jewess, also born in England, and the husband is converted to the Christian faith, and purchases lands, his wife shall not be endowed, if she continues a Jewess. Jewesses.
1 Inst. 31. b.

33. By the statute 6 Rich. 2. st. 1. c. 6. it is enacted, that whenever any woman is ravished, that is stolen, and afterwards consents to live with such ravisher, she shall be *ipso facto* disabled from having dower. Women stolen.

CHAPTER II.

*Of what Things Dower may be, and Nature of this Estate.*SECT. 1. *Estates in Fee Simple.*

3. *Estates Tail.*
6. *Qualified or Base Fees.*
7. *Estates in Coparcenary and Common.*
8. *Remainders and Reversions after Estates for Years.*
10. *Equities of Redemption of some Kind.*
11. *Incorporeal Hereditaments.*
12. *Where a Widow has an Election.*
13. *What Things are not liable to Dower.*
14. *Estates in Joint-tenancy.*
15. *Estates not of Inheritance.*

16. *Wrongful Estates.*

18. *Lands assigned for Dower.*
22. *A Castle, &c.*
23. *Uses, Trusts, and Mortgages.*
24. *Where Dower and Curtesy cease with the Estate.*
25. *Nature of this Estate.*
27. *The Dowress entitled to Emblements.*
28. *Restrained from Alienation.*
30. *And from Waste.*
32. *Not subject to her Husband's Incumbrances.*
33. *In some cases Dower depends upon the Election of third Persons.*

SECTION I.

Estates in fee simple.

A WOMAN is entitled to dower out of all the lands whereof her husband was seised in fee simple, at any time during the coverture; (a) and also of all the profits arising out of those lands,

(a) [This now relates only to women married before, or on the 1st day of January, 1834, stat. 3 & 4 Will. 4. c. 105, s. 14, for by that statute it is enacted, s. 4. That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will.

Sect. 5. That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements, to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

Sect. 6. That a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

Sect. 7. That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Sect. 8. That the right of a widow to dower shall be subject to any conditions, re-

such as mines, minerals, &c. and in a modern case, the court of Common Pleas certified to the Lord Chancellor, that dower was due of mines of coal and lead, wrought during the coverture; whether by the husband, or by lessees for years, paying pecuniary rents, or rents in kind; and whether the mines were under the husband's own land, or had been absolutely granted to him, to take the whole *stratum* in the land of others. But that dower was not due of mines or *strata* unopened, whether under the husband's land or the soil of others.

Stoughton v. Leigh,
1 Taunt. 409.

2. A woman is dowable of the profits of a mill, a park, a dove-house, or fishery. So of the profits of courts, fines, and heriots and also of shares in the navigation of the River Avon.

1 Inst. 32. a.

1 Ves. Jun. 652.

3. A woman is also entitled to dower out of all estates whereof her husband is seised in tail general or special, if her issue be capable of inheriting them. And Lord Coke says, albeit the wife be a hundred years old, or that the husband at his death was but four or seven years old, so as she had no possibility to have issue by him; yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attain, the law cannot judge that impossible, which by nature was possible. And for the husband's being of such tender years, he hath *habitus*, though he hath not *potentiam* at that time; and, therefore, his wife shall be endowed.

Estates Tail.
Lit. s. 53.

1 Inst. 40. a.

4. Dower is an incident so inseparably annexed to an estate

strictions, or directions, which shall be declared by the will of her husband, duly executed, as aforesaid.

Sect. 9. That where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Sect. 10. That no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land, not liable to dower shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

By sect. 11. It is provided that nothing therein contained shall prevent any Court of Equity from enforcing any covenant or agreement, entered into by or on the part of any husband, not to bar the right of his widow to dower, out of his lands or any of them.

And by sect. 12. It is enacted, that nothing therein contained shall interfere with any rule of Equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows, in satisfaction of dower, are entitled to priority over other legacies.]

tail, that it cannot be restrained by any proviso or condition whatever. And although the estate tail should determine by the death of the husband, without issue capable of inheriting it, yet the wife shall be endowed; because dower is a condition *tacite* annexed to the gift of every estate tail.

Lit. s. 53.
1 Inst. 224. a.
Id. 31 b.
Tit. 5. c. 2.

Blithman's
Case, Cro. Eliz.
280.

Tit. 2. c. 2. s. 1.

5. Where a tenant in tail covenanted to stand seised to the use of himself for life, remainder to the use of his eldest son in tail; and afterwards married and died; it was resolved that his widow should be endowed; because when a tenant in tail limits an estate for his own life, he has executed all the power he had; and the remainder is merely void; so that he continues tenant in tail as before.

Qualified or
Base Fees.
Tit. 1.

Plowd. 557.
Tit. 35. c.

6. A woman is dowable of a qualified fee, as long as it continues; therefore, in the case of a limitation to A. and his heirs, tenants of the manor of Dale, the widow of A. would be entitled to dower. It is the same of a base fee, so that if a tenant in tail conveys his estate by fine to A. and his heirs, by which he acquires an estate to him and his heirs, as long as the tenant in tail has heirs of his body, the wife of A. will be entitled to dower against her husband's heirs.

Estates in co-
parcenary and
common.

Remainders and
reversions after
estates for years.

7. Widows are dowable of estates held in coparcenary, and in common; of which an account will be given under those titles.

8. It has been stated that a woman is not entitled to dower out of an estate in remainder or reversion expectant on an estate of freehold, because the husband has no seisin. (b) But a woman is dowable of a reversion expectant on a term for years, because the husband is seised of the freehold.

1 Inst. 32. a.

9. Thus if a man before his marriage makes a lease for years, reserving rent, his wife will be entitled to a third of the land for her dower; and also to a third of the rent as incident to the reversion. If no rent be reserved on the lease, then although the widow may recover a third of the reversion, yet the judgment will be with a *cessat executio* during the term. In some cases a court of equity will assist the dowress in removing the term; and in others not; of which an account will be given in a subsequent title.

Equities of re-
demption of
some kind.

10. Where lands are mortgaged for a term of years only, a woman will be entitled to dower out of the equity of redemption.

(b) [The law remains unaltered by the late act 3 & 4 Will. 4. c. 105. as to estates in reversion.]

But if lands are mortgaged in fee before the marriage, the wife will not be entitled to dower, because the husband has not the legal estate. (c) Tit. 15. c. 3.

11. A widow is dowable of several incorporeal hereditaments; such as advowsons, tithes, commons, offices, franchises, and rents; as will be shewn under those respective titles: [but she is not entitled to dower out of a personal annuity granted to her husband and his heirs.] Incorporeal hereditaments. Stat. 3 & 4 Will. 4. c. 105. s. 1. Title 28. c. 2. s. 16.

12. There are some cases in which a widow has a right of election, as to the property out of which she is dowable. Thus if the husband exchanges his lands for others, his widow shall have her election to be endowed, either of the lands given, or of those taken, in exchange; because her husband was seised of both during the coverture. And there are some other cases where the widow has the right of election, which will be stated hereafter. (d) Where a widow has an election. Co. Lit. 31. b. Perk. s. 319. F. N. B. 149. n.

13. Having enumerated the different kinds of property which are liable to dower, I shall now examine what things are not subject to this claim. What things are not liable to dower.

14. Estates held with other persons in joint-tenancy are not subject to dower, the reason of which will be given under that title. Estates in joint tenancy. Stat. 3 & 4 Will. 4. c. 105. s. 2.

15. An estate in dower is a continuation of the husband's estate, and is therefore only incident to estates of inheritance, not to estates which the husband holds for his life. And it is not only necessary that the husband should have an estate of inheritance, to entitle the wife to dower, but the estate must also be *simul et semel* in him. Estates not of inheritance. Hooker v. Hooker. Tit. 16. c. 6. Bates v. Bates, Tit. 32. c. 24.

16. A widow is not dowable of a wrongful estate. So that if a tenant in tail discontinues in fee, afterwards marries, disseises the discontinuee and dies seised, his wife shall not have dower; because the issue is remitted to the ancient entail; and the estate which the husband had during the coverture was wrongful. Wrongful estates. 1 Inst. 31. b. Fitz. n. B. 149. Tit. 29. c. 1.

17. So where a man having title to lands, enters and disseises the tenant, and dies seised, and his heir enters by which he is remitted to the ancient right, the widow of the disseisor is not entitled to dower, because her husband's estate was wrongful. Idem.

(c) [Vide *supra*, Ch. I. s. 35. note.]

(d) [See stat. 3 & 4 Will. 4. c. 105. s. 9. 10. *supra*, p. 160. note.]

Lands assigned
for dower.

1 Inst. 31. a.
Bustard's case,
4 Rep. 121.

Lib. 6. c. 17.

Infra, c. 14.

Bro. Ab. Cur-
tesy, 10.

Hilchins v.
Hilchins,
2 Vern. 403.

A Castle, &c.
2 Inst. 16.
1—31. b.

Gerard v.
Gerard,
Tit. 26.

Uses, trusts,
and mortgages.
Tit. 11. 12. 15.

18. A widow is not dowable of lands assigned to another woman in dower. Thus if the ancestor of a married man dies, and he endows the widow of such ancestor of one third of the lands which descended to him, and dies; his widow will only be entitled to a third of the remaining two thirds; for it is a maxim of law, as ancient as Glanville, that *dos de dote peti non debet*. The reason of which is, that when the heir endows the widow of the ancestor, that defeats the seisin which he acquired by the descent of the lands to him. So that the widow is in of the estate of her husband, and the heir is considered as having never been seised of that part.

19. In the same manner, if a woman on whom lands descend endows her mother, afterwards marries, has issue, and dies in the lifetime of her mother; her husband will not be entitled to an estate by the curtesy in those lands whereof the mother was endowed; because the daughter's seisin was defeated by the endowment.

20. The rule of *dos de dote* is only applied where dower is actually assigned; for if no dower be assigned, it does not take place.

21. Lands subject to a title to dower were devised to a person in fee; he died, leaving a widow, who sued for dower, and recovered a third part of the whole; without any regard to the title of dower in the widow of the testator, who had not made any claim to it. The Court held, that as the testator's widow had not recovered dower, it was to be laid out of the case: so that the dower of the devisee's widow was not to be looked upon as *dos de dote*.

22. It appears from *Magna Charta* that a widow was not dowable of a castle or fortress, nor even of a capital mansion, where it was *caput comitatus*, or *baronia*. But this was only applicable to baronies by tenure; and therefore the circumstance of a person's being created a baron, by letters patent, by a title taken from a principal mansion house in his possession, will not make that house the *caput baronia*, so as to exclude the widow from claiming dower out of it.

23. A widow was never allowed dower of a use; nor is she now entitled to dower out of a trust estate; and where an estate is conveyed to a man by way of mortgage, it is not subject to dower.

24. It has been stated that in the case of an estate tail, the curtesy of the husband, and the dower of the wife continue; though the estate tail be determined. But there are several cases where the curtesy and dower cease upon the determination of the estate. 1. Where the fee is evicted by a title paramount, both curtesy and dower necessarily cease. 2. Where the seisin of the husband is wrongful, and the heir is remitted; by which the wrongful estate is determined; the right to dower ceases. 3. Where the donor enters for breach of a condition, the right to curtesy and dower is defeated. 4. Where a person has a qualified or base fee, the right to curtesy and dower ceases, when the estate is determined. 5. Where an estate in fee simple is made determinable upon some particular event, if that event happens, curtesy and dower cease with the estate.

Where dower and curtesy cease with the estate.

Lit. s. 393.

Ante, s. 16.

Tit. 13. c. 2.

10 Rep. 98. a.

Buckworth v. Thirkell, Tit. 38. c. 17.

25. The interest which widows acquired by way of dower was seldom greater than for their own lives, unless it was otherwise stipulated at the time of the marriage. And in England dower does not appear to have ever consisted of more than an estate for life.

Nature of this estate.

26. Before the abolition of military tenures, the dowress was attendant on the heir, or whoever else was entitled to the reversion, for the third part of the services; and still she holds of the heir by fealty. The assignment of dower by the heir being a species of subinfeudation, not prohibited by the statute *Quia Emptores*, because the heir does not depart with the fee.

Gilb. Uses 357.

27. At common law a dowress could not devise corn which she had sown; nor did it go to her personal representatives, but became the property of the reversioner; because the widow, being entitled to an immediate assignment of dower, after the death of her husband, if the lands happened to be sown at that time, she had the benefit of it; which made her case different from that of other tenants for life, who are seldom put into possession of lands that are sown. It was however provided by the statute of Merton, 20 Hen. 3. c. 2. that a dowress might dispose by will, of the growing corn; otherwise that it should go to her executors.

The dowress entitled to emblements.

2 Inst. 80.

28. Tenants in dower were under the same restraints respecting alienation as other tenants for life. But where a dowress alienated by feoffment, and the feoffee died seised, whereby the entry of the person in reversion was taken away, he could have

Restrained from alienation. 2 Inst. 309.

no writ of entry *ad communem legem*, until after the decease of the tenant in dower; and then the warranty, which at that time was usually inserted in all deeds, barred the reversioner, if he was heir to the dowress. To remedy this, the statute of Gloucester, 6 Edward 1. c. 7. provided, that upon the alienation in fee, or for life, of a tenant in dower, she shall forfeit her estate; and the heir shall have a writ of entry *in casu proviso*, in the lifetime of the dowress.

Tit. 36. c. 10.

29. By the statutes 11 Henry 7. c. 20. (e) and 32 Henry 8. c. 36. it is declared that no feoffment, fine, recovery, or warranty, by tenant in dower, shall create a discontinuance of the inheritance, or take away the entry of the heir, or person in reversion; but that all such acts shall operate as a forfeiture of her estate.

And from waste.
Ante, s. 1.

30. Tenants in dower are prohibited from committing any kind of waste. But it was lately held by the Court of Common Pleas, that if land assigned for dower contained an open mine of coal, or lead, the dowress might work it for her own benefit.

1 Inst. 57. a.
n. 1.

31. It is however somewhat doubtful whether dowresses be within the statute 6 Ann. respecting accidental fire.

Not subject to
her husband's
incumbrances.
1 Inst. 46. a.
4 Rep. 65. a.

32. The widow holds her dower discharged from all incumbrances, created by her husband after the marriage; (f) because upon the husband's death, the title of the wife being consummate, has relation back to the time of the marriage, and to the seisin which the husband then had; both of which precede such incumbrances. And dower is even protected from distress, for a debt contracted by the husband to the crown, during the marriage.

1 Inst. 31. a.
Fitz. N. B. 150.

[33. The title to dower may in some cases depend upon the election of third persons.

When it depends on the
election of third
persons.
Co. Lit. 144. b.
145.
Fitz. N. B. 152.
a.

The widow is *prima facie* entitled to be endowed of a rent charge; but if, before distress and avowry made, the husband die, and the heir brings a writ of annuity, which is a mere personal remedy, and recovers judgment on it, or proceeds no far-

(e) [Except as to lands in settlement made before the passing of the stat. 3 & 4 Will. 4. c. 74. (s. 16. 17.) the above act is repealed]

(f) [The law is now altered except as it respects the dower of women married before or on the 1st day of January, 1834. The charges and incumbrances of the husband are now effectual against the dower of the wife married since the above-mentioned period. Stat. 3 & 4 Will. 4. c. 105. s. 5. *vide supra*, page 160. note.]

ther than filing a declaration, the heir's election is bound, and the rent charge will be converted into personal annuity. But if before declaration or avowry by the heir, the widow recover against him in a writ of dower, her right will be established.

34. Again, where the husband, previously to the title of dower attaching, has by contract given the tenant or other person an option of purchasing the estate, and such option is exercised either before or after the husband's death, it will convert the estate into personalty, and defeat the widow's right to endowment.]

7 Ves. 436.
Townley v.
Bedwell,
14 Ves. 591.

CHAP. III.

Assignment of Dower, and Modes of Recovering it.

SECT. 1. *Necessity of an Assignment.*
 2. *Who may assign Dower.*
 6. *How it is to be assigned.*
 16. *Remedies against an improper Assignment.*
 21. *Effect of an Assignment of Dower.*

SECT. 24. *Actions for recovering Dower.*
 25. *May be obtained in Chancery.*
 28. *[Arrears of Dower not recoverable after six years.]*

SECTION I.

Necessity of an assignment.

2 Comm. 132.

Gilb. Ten. 26.

2 Inst. 16.
 Mad. Exch.
 c. 10. s. 4.

Who may assign dower.

UPON the death of the husband the right to dower, which the wife acquired by the marriage, becomes consummate: but unless the precise portion of land which she is to have is particularly specified, as was formerly sometimes done, she cannot enter till dower is assigned to her; for she might in that case choose whatever part of the lands she pleased, which would be injurious to the heir. The widow has therefore no estate in the lands of her husband till assignment; for the law casts the freehold on the heir, immediately upon the death of the ancestor.

2. A widow could not formerly obtain an assignment of her dower, without paying a fine to the lord; nor could she marry a second husband without his licence. It was even usual for lords to force widows to marry, merely for the purpose of obtaining a fine. It was therefore provided by the charter of King Henry I., and also by *Magna Charta*, that widows should not be forced to marry, or be obliged to pay a fine for the assignment of their dower.

3. With respect to the persons whose duty it was to assign dower, the heir, (a) in common cases, as lord of the manor, and

(a) [The heir, though a minor, is competent to assign dower. 1 Roll. Ab. 137. 681. Cro. Eliz. 309. *Gore v. Perdue*.]

who was to create the tenure, assigned dower. If there was any dispute as to the quantity of land assigned, it was determined by the *pares curia*, in the Court Baron: but the suit might be removed to the county court, and also to the king's court.

4. Regularly no person can assign dower who has not a freehold estate in the land. But where a disseisor, abator, or intruder, assigns dower, it is good, and cannot be avoided; unless they are in of such estates by fraud and covin of the widow, to the intent that she may be endowed by them, or recover dower against them; for in that case the assignment may be avoided by the entry of the real owner. 1 Inst. 35. a.
357. b.

5. The reason why such an assignment of dower shall be good is, because the widow having a right to dower, she might have compelled the disseisor, abator, or intruder, as *terretenants*, to assign dower to her; and was not obliged to wait till the heir thought proper to re-enter, or sue for the recovery of his right. But where the heir or other tenant of the land refuses to assign dower, and the widow is obliged to resort to the courts of law to obtain an assignment, it is made by the sheriff. Idem.
Perk. 394.
1 Inst. 34. b.

6. With respect to the manner in which dower ought to be assigned, the rule is that where the property is capable of being severed, it must be by metes and bounds; and if the sheriff does not return seisin by metes and bounds, it is ill. But where no division can be made, the widow must be endowed in a special and certain manner. As of a mill a widow cannot be endowed by metes and bounds, nor in common with the heir: but she may be endowed, either of the third toll dish, or of the entire mill, for a certain time. How it is to be assigned.
1 Inst. 32. b.

7. It was held by the Court of Common Pleas in a late case that dower may be assigned of mines, either collectively with other lands, or separately of themselves; that it should be assigned by metes and bounds, if practicable, otherwise either by a proportion of the profits, or separate alternate enjoyment of the whole, for short proportionate periods. Ante, c. 2. s. 1.

8. Dower was assigned by metes and bounds, because it was a tenancy of the heir, and like all other lands in tenure ought to be separated from the demesnes of the manor. The right to have an assignment of dower by metes and bounds may however be waived by the widow; and in that case an assignment in Gilb. Uses,
356.
Coots v. Lambert, 9 Vin. Ab.
256.

Rowe v. Power,
2 Bos. & Pul.
N. R. 1.

common will be good. But an assignment by the sheriff must be by metes and bounds, if it can be done.

1 Inst. 32. b.
9 Vin. Ab. 256.

9. An assignment by metes and bounds can only take place where the husband is seised in severalty; for where he is seised in common with others, his widow cannot be endowed by metes and bounds; for she being in *pro tanto* of her husband's estate, must take it in the manner in which he held it.

1 Inst. 32. b.
n. 2.

10. Lord Coke says an endowment by metes and bounds, according to common right, was more beneficial to the widow than to be endowed against common right; for there she shall hold the land charged, in respect of a charge made after her title to dower.

Turney v.
Sturges,
Dyer 91.

11. The assignment of dower must be of part of the lands whereof the widow is dowable; for an assignment of lands whereof she is not dowable, or of a rent issuing out of such lands, is no bar of dower; because a right or title to a freehold estate cannot be barred by a collateral satisfaction. But a rent issuing out of the land whereof a woman is dowable may be assigned for dower. And if a tenant in tail assigns a rent out of the land intailed for dower, not exceeding the yearly value of such dower, it will bind the issue in tail.

4 Rep. 1. a.

9 Vin. Ab. 261.

Id. 258.

12. If an assignment and grant of lands be made to a woman for a term of years, in recompence of her dower, this will not bar her of dower, because she has not such an estate as if she had been endowed; namely, an absolute estate for life. It is the same if she accepts a rent for years in allowance of her dower, or for the life of him who assigns it. These rents will not bar her of dower, because she has not the same estate in them as in her dower.

2 And. 31.
Hob. R. 153.

1 Inst. 34. b.
Wentworth v.
Wentworth,
Cro. Eliz. 450.

13. The assignment of dower must also be absolute; and not subject to be defeated by any condition, nor lessened by any exception or reservation. For the widow comes to her dower in the *per*, by her husband, and is *in*, in continuance of his estate, which the heir or terretenant is but a minister, or officer of the law, to carve out to her. Therefore such conditions or reservations are totally void, and her estate discharged from them; or else the estate assigned with such conditions is no bar to her recovery of dower, in an action. But where the lands were leased for years before the marriage, the assignment of

Wheatley v.
Best, Cro.
Eliz. 564.

dower is made with a proviso that the tenant for years shall not be disturbed.

14. Dower may be, and was usually assigned by the heir, by a parol declaration that the widow shall have such particular lands for her dower; or else that she shall have a third part of all the lands whereof her husband died seised.

1 Inst. 5. a.
Booth v. Lambert, Sty. 276.

15. In some cases a woman shall have a new assignment of dower. As where she is evicted out of the lands assigned to her, she shall be endowed of a third of the remainder.

4 Rep. 122. a.

16. Where the sheriff makes an improper assignment of dower, it will be set aside by the Court of Common Pleas, or the Court of Chancery; and he will be punished.

Remedies
against an im-
proper assign-
ment.

17. Thus where the sheriff returned that he had assigned to the demandant, for her dower of a house, the third part of each chamber; and had chalked it out for her. This was held an idle and malicious assignment; and the sheriff was committed for it, as he ought to have assigned to her certain chambers or rooms.

Abington's
case, cited
Palm. 264.

18. In another case the sheriff was committed for refusing to make an equal allotment of dower: and for taking sixty pounds to execute the writ. An information was also ordered against him.

Longvill's case,
1 Keb. 743.

19. A bill was brought by the heir to be relieved against a fraudulent assignment of dower by the sheriff; because a third part of the lands was assigned, without taking notice of a coal work that was on the estate; the plaintiff offering the defendant one entire third, both of land and coal work, by way of rent-charge on the whole. The Court ordered that she should accept thereof; or that otherwise a new assignment of dower should be made.

Hoby v. Hoby,
1 Vern. 218.

[20. When the assignment of dower is made not by the sheriff but by the heir, if he were of full age, and under no disability when he made the assignment, although the assignment exceeded the widow's third of the value of the estate, he will not be relieved by a Court of Law.

Gilb. Dower,
380.
Sloughton v.
Leigh,
1 Taunt. 404.
412.

But if the heir were under age when he assigned dower, he will be protected against the consequences of excessive assignment, and may have his writ of admeasurement of dower.

Gilb. Dower,
382.
Fitz. N. B. 148.
G. H.

But he cannot defeat the assignment of dower by entry.]

Gilb. Dower,
388.

Effect of an assignment of dower.

1 Inst. 35. a.

Lit. s. 393.
Gilb. Uses, 356.
395.

Ants, c. 2. s. 18.

1 Inst. 38. b.
Bustard's case,
4 Co. Rep. 122.
a.

Actions for recovering dower.
Gilb. Uses, 374.
367.

May be obtained in Chancery.
Tothill 82.
Treat. of Eq.
B. 1. c. 1. s. 3.
Curtis v. Curtis,
2 Bro.C.C. 620.
Mundy v. M.
4 ib. 294.
2 Rep. Husb.
and Wife, Jac.
ed. 450—1. & n.

Hamilton v.
Mohun, 1 P.
Wms. 118.

21. The widow ^{ac}quires an estate of freehold by the assignment, without livery of seisin; because dower is due of common right; and the assignment is an act of equal notoriety.

22. As soon as dower is assigned, the widow holds by the institution of the law, and is in of the estate of her husband; so that after assignment she is considered as holding by an infeudation immediately from the death of her husband; therefore the heir is not considered as having ever been seised of that part of his ancestor's estate, whereof the widow is endowed.

23. Where dower is assigned, there is a warranty in law implied, that if the tenant be impleaded, she shall vouch the heir; and if evicted, shall recover in value a third of the remainder.

24. Where the heir or terretenant refuses to assign dower to the widow, the law has provided her with several remedies for recovering it. The first of these is the writ of dower, *unde nihil habet*, which lies where no dower has been assigned. But if any part of dower has been assigned, the widow cannot say *unde nihil habet*, and therefore she must have recourse to the writ of dower; which is a more general remedy, extending either to a part, or to the whole. (*d*)

25. Where a woman was disabled from suing for her dower at law, she was always relieved in equity. And now it is settled that widows labour under so many difficulties at law, from the embarrassment of trust terms, and other matters, that they are fully entitled to every assistance which a court of equity can give them, not only in paving the way to establish their right at law, but also in giving them complete relief, when the right is ascertained.

26. Where a mother was guardian to her child, and received the rents of the estate of which she was dowable, but dower was never assigned to her; the Court of Chancery held that the want of a formal assignment of dower was nothing in equity, for still the right in conscience was the same. And if the heir brought a bill against the mother for an account of the profits, it was just that a court of equity should, in the account, allow a third of the profits for the right of dower.

(*d*) [Writs of right of dower, *unde nihil habet*, a *quare impedit* and ejectment are excepted out of the 36th section of the stat. 3 & 4 Will. 4. c. 27. by which real and mixed actions are abolished.]

27. [In assigning dower the Court of Chancery allows the widow an account of mesne profits from the death of the husband, and will not permit her title to them to be defeated by the death of the tenant *pendente lite*, and although the length of time which may have elapsed since the husband's death exceed six years prior to the bill filed.

Curtis v. Curtis,
ubi supra.
Oliver v. Richardson, 9 Ves.
122.

28. By stat. 3 and 4. Will. 4. c. 27. s. 40. it is enacted that after the 31st day of December, 1833, no arrears of dower, nor any damages on account of such arrears shall be recovered by action or suit, for a longer period than six years next before the commencement of such action or suit.]

Arrears not recoverable after six years.

CHAP. IV.

What will operate as a Bar or Satisfaction of Dower.

- | | |
|---|---|
| <ul style="list-style-type: none"> 2. <i>Attainder of the Husband.</i> 4. <i>Attainder of the Wife.</i> 5. <i>Elopement with an Adulterer.</i> 12. <i>Detinue of Charters.</i> 14. <i>Fine or Recovery.</i> 15. <i>Bargain and Sale in London.</i> 16. <i>Jointure.</i> 17. <i>An Outstanding Term.</i> | <ul style="list-style-type: none"> 18. <i>A Devise is no Bar to Dower.</i> 23. <i>Unless so expressed, when the Widow has an Election.</i> 28. <i>Sometimes held a Satisfaction.</i> 31. <i>A Bequest of Personal Estate no Bar to Dower.</i> |
|---|---|

SECTION I.

See stat. 3 & 4
Will. 4. c. 105.
s. 14.

THE right to dower attaches at the instant of the marriage; nor, can it [as regards the dower of women married before or on the 1st day of January, 1834] be defeated by the alienation of the husband alone: but still the wife may be barred from claiming dower by several acts subsequent to the marriage.

Attainder of
the husband.
1 Inst. 41. a.
Rob. Gav. 230.

2. Formerly, if a man was attainted of treason or felony, his wife was thereby barred of her dower at common law, and by custom; except where the lands were held in gavelkind. By the statute 1 Edw. 6. c. 12. the rigour of the common law was abated in this respect, it being thereby enacted that in all cases where the husband was attainted of treason or felony, his wife should have dower. But a subsequent statute, 5 & 6 Edw. 6. c. 11. revived this severity against the widows of traitors, who are now barred of dower. And the words of the act being general, exclude the wife, as well in cases of petit, as of high treason.

1 Inst. 392. b.

Mayne's case, 1.
Leon. 3. pl. 7
Co. Lit. 392.
Perk. s. 387.

[The attainder, though followed by pardon, will defeat the dower of lands whereof the husband was seised prior to such pardon.]

Menvil's case,
13 Co. 19.
Moor. 639.
4 Bl. Com. 392.

But if the attainder be reversed for error the widow's title will revive.]

3. In cases of misprision of treason, or attainder of felony

only, the stat. 1 Edw. 6. is still in force; therefore the widows of such persons are entitled to dower: and where offences have been made felony by modern acts of parliament, the wife's dower is, in general, expressly saved.

5 Eliz. c. 11.
s. 4. 18 Ib. c. 1.
s. 2. 8 & 9 Will.
3. c. 36. s. 7.
15 Geo. 2.
c. 28. s. 4.

4. If a woman be attainted of treason or felony, she will thereby lose her dower: but if pardoned, she may then demand it, though her husband should have aliened his land in the mean time; for when this impediment is once removed, her capacity to be endowed is restored.

Attainder of
the wife.
1 Inst. 33. a.
13 Rep. 23.

5. It has been stated that a divorce on account of adultery is no bar to dower. But by the stat. Westm. 2. c. 34. it is enacted, that if a wife willingly leaves her husband, and continues with an adulterer, she shall be barred of her action to demand dower, if she be convicted thereupon; except her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action.

Elopement
with an
adulterer.
2 Inst. 433.

[And in the recent case of *Hethrington v. Graham*, it was held that adultery was a bar to dower, although committed after the husband and wife had separated by mutual consent.]

6 Bing. 135.

6. Lord Coke, in his comment on the above statute, observes on the words *si sponte reliquerit virum suum, et abierit, et moretur cum adultero*; that although the words of this branch be in the conjunctive, yet if the woman be taken away, not *sponte*, but against her will, and after consent, and remain with the adulterer, without being reconciled, she shall lose her dower. For the cause of the bar of her dower is not the manner of her going away, but the remaining with the adulterer, without reconciliation. He also observes upon the words *moretur cum adultero*, that although she does not continually remain with the adulterer, yet if she be with him, and commits adultery, it is a tarrying within the statute. Also if she once remains with the adulterer, and after he keeps her against her will; or if the adulterer turns her away: yet she shall be said *morari cum adultero*, within the act.

2 Inst. 435.

Idem 436.
Co. Lit. 32 a. &
n. 9.
1b. 32.

7. He further observes, that if a woman who has eloped from her husband with an adulterer, is afterwards reconciled, and cohabits with her husband, by coercion of the church, yet she will be barred of her dower. And if a woman goes away with another man, with her husband's consent, and afterwards that man

Id. 435.

commits adultery with her, and she remains with him, without being reconciled to her husband, she shall be barred of her dower. (e)

Vol. 1. 146.

8. There is a curious case in the Rolls of Parliament, 30 Edward I. where a man by deed granted his wife to another, with whom she eloped, and lived in adultery. It was determined, 1. That it was a void grant. 2. That it did not amount to a licence, or at least was a void licence. 3. That after elopement there should not be any averment *quod non fuit adulterium*, though she married the adulterer after her first husband's death: therefore that she was barred of dower. A sentence of purgation of adultery in the ecclesiastical court was also produced, but it was not allowed to have any effect.

Coot v. Berty,
12 Mod. 232.
S. P.

Green v. Harvey,
1 Roll. Ab. 680.

9. Where the friends of the husband removed him from his wife, published that he was dead, and persuaded the wife to marry another man, though the wife lived in adultery; yet inasmuch as *non reliquit virum sponte*, it was held that she did not forfeit her dower.

2 Inst. 436.

10. With respect to the circumstances necessary to prove a voluntary reconciliation by the husband, Lord Coke says, cohabitation is not sufficient, without reconciliation made by the husband *sponte*: so that cohabitation only in the same house with the husband will not avail. But in the following case, cohabitation as man and wife appears to have been held a sufficient proof of reconciliation.

Haworth v.
Herbert,
Dyer 106.

11. Reconciliation being pleaded, evidence was given that the husband and wife had, after the elopement, slept together several nights, and in divers places, and demeaned themselves as man and wife. It was objected that they never lived together in one house, but were apart; and the wife continued in adultery with one or more, during the life of her husband, *sed non allocatur*; for there might have been divers elopements, and divers reconciliations: and the defendant ought to take issue on one at his peril.

2 Inst. 436.

Detinue of
Charters.
Beddingfield's
case, 9 Rep. 15.
Dyer, 250. a.

12. Detinue of charters is another cause of the loss of dower. For if in a writ of dower the tenant pleads that the demandant detains the charters of the estate, and she denies the fact, which is found against her, she shall lose her dower. But, 1. The

(e) [The husband will not be obliged to take his wife back again after she has eloped from him and committed adultery. 6 T. R. 603.]

charters ought to relate to the land whereof dower is demanded.

2. He who pleads this plea ought to shew the certainty of the charters; whereupon a certain issue may be joined, as that they are in a chest or box, locked or sealed, which imports sufficient certainty. 3. No stranger, though he be tenant to the land, and has the evidences conveyed to him, can plead this plea.

13. In several cases the heir is in the degree of a stranger, and therefore shall not plead detinue of charters. 1. If the heir has the land by purchase. 2. If he has delivered the charters to the widow; for then she has them by his own act. 3. If the heir be not immediately vouched. 4. If he comes in as vouchee. 5. If he comes in as tenant by receipt. The reason is manifest, if the true form of pleading in that case be observed: for he who pleads detinue of charters, in bar of dower, ought to plead that he has been always ready, and yet is, to render dower, if the demandant would deliver to him his charters. Idem.

14. If a woman joins with her husband in levying a fine, or suffering a common recovery, of lands whereof she is dowable, she will thereby effectually bar herself from claiming dower out of those lands. The principles upon which this doctrine is founded will be explained hereafter. Burdon v. Burdon, 1 Salk. 252.

15. By the custom of London a married woman may bar herself of dower, by a deed of bargain and sale, acknowledged before the lord-mayor, or the recorder, and one alderman, and enrolled in the court of hustings; the wife being examined separately from her husband, as to her consent. Fine or Recovery.

16. The most usual mode of barring dower, in modern times, is by means of a jointure settled on the wife before marriage: of which an account will be given in the next Title. Tit. 35, 36.

[17. A legal term of years created before the title of dower attached, will, if assigned to a trustee for a purchaser, be a protection against the dower of the vendor's wife, whose claim will be barred by a *cesset executio* during the term. The court has even compelled the widow herself, in whom the term happened to vest by the death of the trustee, to assign the term to the purchaser's trustee, to the exclusion of her own dower. Bargain and sale in London. Bohun. Priv. Lond.

Thus in *Mole v. Smith*, the freehold estate of Watson, a bankrupt, was sold by the assignees to Smith, who entered into possession under the contract, and afterwards filed his bill against the assignees, the bankrupt, and his wife, for specific performance. Jointure.

1 Jac. 490.

ance, and an assignment of three terms, which, upon the bankrupt's purchase, had been assigned to Yellowly to attend. The terms happened to vest in the bankrupt's wife as surviving administratrix of Yellowly. Upon the bankrupt's death his widow claimed her dower, and insisted that she ought not to be compelled to assign the terms vested in her to a trustee for the purchaser as a protection against her dower. Sir Thomas Plumer, M. R., expressed considerable doubt whether the court could compel her to assign the term. The cause came on again before Lord Eldon, C., on the 4th of April, 1822. The following were the reasons of his lordship's decision; that the husband, before his bankruptcy and in his lifetime, might have compelled the administrator of Yellowly to assign the terms to a trustee for the purchaser; that the purchaser would have been entitled to call for such assignment in order to protect himself from the claim of the wife's dower; that the assignees for the benefit of the creditors were entitled as fully as the bankrupt himself; and that the widow, as administrator of Yellowly, could not make any use of the terms for her own benefit, which she could not have compelled Yellowly himself to make: His lordship accordingly declared that as the trustee Yellowly (whom the bankrupt's widow represented) would if living have been compelled by the assignees to assign the terms to a trustee for the purchaser, in order to carry the contract into effect, the widow was also compellable to assign them.

Tit. 12. ch. 3.
s. 45.
Maundrell v.
Maundrell,
7 Ves. 567.
10 Ves. 246.

A devise is no
bar to dower.
1 Inst. 36. b.
4 Rep. 4. a.
Tit. 38. c. 1.
See also 3 & 4
Will. 4. c. 105.
ss. 9. 10.
supra, p. 161,
note.

Tit. 38. c. 9.

But as between the widow and the heir and devisee of her husband, she will not be excluded by the term, which is as much attendant upon her dower, as upon the remaining interest in the inheritance, and she will be entitled to the benefit of it.]

18. Every devise or bequest in a will imports a bounty; and therefore cannot in general be averred to be given as a satisfaction for that to which the devisee is, by law, entitled. In consequence of this principle, a devise cannot be averred, even in equity, to be in satisfaction of dower, unless it is so expressed in the will. 1. Because a devise implies a consideration in itself; and cannot be averred to be for the use of any other person than the devisee, unless it is so expressed in the will: no more can a devise be averred to be in satisfaction of dower, unless it is so expressed. 2. As all wills of land must be in writing, no aver-

ment respecting the intention of a testator is admissible, which cannot be collected from the words of the will itself.

19. A person being indebted, devised part of his lands to his wife, but did not mention it to be in bar of dower; and devised the residue to his executors, till his debts were paid. The wife brought a writ of dower, and recovered her dower. The heir filed a bill in Chancery against her, to be relieved. The Court said the devise was not to be looked upon as a recompence or bar of dower, but as a voluntary gift.

Hitchin v. Hitchin,
Prec. in Cha.
133.

20. If a husband devises lands to his wife during her widowhood only, or restrains the devise in any other manner, so as to render it less beneficial than dower, a court of equity will not interfere; but the wife will be allowed to take both the thing devised, and also her dower.

21. W. Lawrence devised lands of the annual value of 130*l.* to his wife, during her widowhood. After the determination of that estate, he devised the same premises, together with all his other lands, to trustees for a term of twenty-four years, in trust for the payment of his debts and legacies. As a farther provision for his wife, he directed that after two years of the term were expired, his trustees should permit her to receive the rents and profits of another farm of 90*l. per annum*, for the remainder of the said term of twenty-four years, so long as she should continue a widow. The widow entered upon the lands devised to her, and afterwards brought a writ of dower, to which was pleaded the devise, with an averment that the same was in satisfaction of her dower. Upon demurrer to this plea, judgment was given for the demandant.

Lawrence v. Lawrence,
1 *Ld. Raym.*
438.
2 *Freem.* 234.

A bill was then exhibited in Chancery, to be relieved from this judgment. Lord Somers decreed a perpetual injunction against the widow, to stay her further proceeding upon, the judgment in dower.

2 *Vern.* 365.
1 *Ab. Eq.* 218.

The cause was reheard by Lord Keeper Wright, who ordered a case to be stated. 1. Whether the defendant was barred of her dower by the devise in the will, or not. 2. If she was not barred of her dower by such devise, whether the plaintiff ought to be relieved in that court. A case was accordingly stated, and in 1702 the cause came on upon the case so stated, when his lordship declared that he had fully considered of the matter,

but conceived there was nothing in the testator's will that did intend that the defendant should be barred of her dower: in case any such thing did appear by the will, the same would only be a bar at law, not in that court; and as the matter had been already determined at law, he reversed so much of the former decree as awarded a perpetual injunction against the defendant's proceeding at law upon her judgment in dower.

The cause was brought on again by a remainder-man, before Lord Cowper, in 1715, who declared as to the question of dower, that it being a point of right, and so doubtful in its nature, that the Court had been of different opinions about it, and the determination in 1702 having remained so long unquestioned, he did not think fit to make any variation from what was then determined.

3 Bro. Parl.
Ca. 483.

On an appeal from this decree to the House of Lords, it was contended for the appellant, that it would be against the rules of natural equity and justice, if the respondent should be permitted to enjoy the estates devised to her by her husband's will, and at the same time disappoint his intention, by insisting on her dower: for which the lands devised were far from an equivalent. On the other side, it was said to be nowhere expressed, nor to be collected from the words of the will, that the lands devised to the respondent were for her jointure, or in bar of her dower; neither could it be so averred at law, or in a court of equity; she having no estate for life, but for her widowhood only. The decree was affirmed.

Lemon v.
Lemon,
8 Vin. Ab. 366.

22. A person devised lands to his wife for life, and devised other lands to his brother and his heirs. The wife entered into the lands devised to her, which were of more value than her dower; she afterwards claimed dower of the rest, and had judgment. The brother brought his bill in Chancery to be relieved. The case of Lawrence and Lawrence was cited for the defendant, to prove that the wife should have dower, notwithstanding a devise to her for life of lands by her husband; unless declared to be in lieu and satisfaction of dower. Lord Parker said that this point had been determined in the House of Lords; and dismissed the bill.

Inclendon v.
Northcote,
3 Atk. 433.

Unless so expressed,
when the widow
has an election.

23. If it be said in the will that the devise is made in lieu and satisfaction of dower, or on condition that the wife shall not

claim dower; then the wife cannot have both, for that would be repugnant to the intention of the testator. The wife must, therefore, in such a case, make her election. (a)

Leake v. Randall,
4 Rep. 4. a.

24. A man devised the third part of his lands to his wife, in recompence of her dower. The wife entered on the lands devised to her; it was resolved that she was thereby barred of dower.

Bush's case,
Dyer 220.

25. A person devised his lands to his wife till P. his daughter attained the age of nineteen, afterwards to P. in tail, remainder over in fee. He devised further, that P. should pay, after her age of nineteen, 12*l.* *per annum* to his wife in recompence of her dower; if she failed of payment, that his wife should have the land for her life. The wife, before P. attained nineteen, brought a writ of dower, and recovered a third part; after P. attained nineteen, the wife entered for non-payment of the 12*l.* The question was, whether her entry was lawful.

Goaling v. Warburton,
Cro. Eliz. 128.

It was adjudged, that the wife, having recovered a third part in dower, she should not have the rent; as it was against the intention of the testator that she should have both; that the acceptance of one was a waiver of the other. And upon a writ of error this judgment was affirmed.

26. A man devised his personal estate to trustees, in trust that his widow should receive thereout 100*l.* a-year during her life, in lieu and discharge of her dower. The wife received this annuity for many years, then brought a writ of dower. Decreed that the wife was barred of dower, as long as the personal estate was sufficient.

Lesquire v. Lesquire,
Finch 134.

27. With respect to the acts which will amount to an election, and the time within which they must take place, they will be stated hereafter.

Tit. 38. c. 2.

28. Notwithstanding the doctrine established in the case of *Lawrence v. Lawrence*, and the frequent recognition of it, devises have been sometimes deemed a satisfaction in equity for dower, on account of strong and special circumstances. As where allowing a widow to take a double provision, would be quite inconsistent with the dispositions of the will.

Sometimes held a satisfaction.

29. A person devised to his wife an annuity of 200*l.* a-year, to be issuing out of his lands, with the power of distress and

Villa Real v. Galway,
1 Bro. C. C. 292.
note, Amb. 682.

(f) [But see stat. 3 & 4 Will. 4. c. 105. ss. 9, 10, 12.]

entry; subject thereto, he devised his real estates to his daughter in strict settlement; and directed all his personal estate to be invested in land, and settled to the same uses.

One of the questions in this case was, whether the wife was to take this annuity in satisfaction of her dower or not.

2 Eden 236.

Two cases were cited; the first, *Pitts v. Snowden*, where a man devised to his wife an annuity of 50*l.* a-year, payable out of his freehold and copyhold estates, with a clause of entry and distress; and subject thereto he gave his freehold estates to his three sisters. Lord Hardwicke decreed that the widow was entitled to dower, and also to the annuity. The second, *Arnold v. Kempstead*, where a testator gave some leaseholds to his wife for life, and also 10*l.* a-year during her life, or so long as she should continue a widow, out of the rents of his freehold estates, but without any clause of entry or distress; and devised all his freehold estates to his son. Lord Northington decreed that the widow must elect either her dower or the annuity, but could not take both.

Lord Camden.—The case now before the court is more exactly correspondent, in the form of the devise, to *Pitts v. Snowden*, than to the other case; for in these two cases there is an express clause of entry and distress, whereas there is no such power in *Arnold v. Kempstead*; and they more particularly resemble each other in another circumstance; as the annuity in both is charged upon other funds, not subject to dower, as well as upon the dowable estate; whereas in *Arnold v. Kempstead* the annuity is made to issue only out of the freehold estate, subject to dower. These two being alike in all their circumstances, I must admit that *Pitts v. Snowden* is an authority in point one way, *Arnold v. Kempstead* the other. The question upon this case is this:—

1. Whether if a rent-charge is given to the widow, issuing out of the estate subject to dower, with power of distress, this devise shall operate as a bar, or satisfaction of dower. I am of opinion that it shall; because the claim of dower, 1. Disappoints the will; and, 2. Is inconsistent with with it. It is admitted that every devisee must confirm the will *in toto*, if he claims any interest under it; and must consequently forfeit such interest, if he impeaches or interrupts any part of it. In this case the will is contradicted by the claim of dower. 1. Because it puts the trustees out of possession; for they cannot hold the whole, sub-

Vide Tit. 38.
c. 2.

ject to the annuity and distress, without being in possession of the whole ; nor can the annuitant, consistent with the will, take possession of any part, because her right accrues upon default of payment. And though the present case gives the right of entry upon the whole, or any part, in more explicit terms than *Pitts v. Snowden* ; yet the general power of entry and distress, in *Pitts v. Snowden*, is tantamount in this particular. The possession, therefore, of the trustees being co-extensive with the annuities and the distress, it is not possible in such a case, to make the land subject to the dower and the rent-charge at the same time ; because, as annuitant, the widow must be out of possession of the whole ; as dowress she must be possessed of a part. Hence it follows, that where the testator gives the estate, subject to the annuity, as he doth in this case, he must be intended to give, subject to the annuity only ; and the residue of the rents and profits being given to the devisee, must exclude all charges, except only the annuity. In this view of the matter the widow, by the claim of dower, disappoints the will in the most essential part of the testator's plan, by reducing the interest of the devisee, and loading the estate with an additional burthen. 2. The claim of dower is inconsistent with the will in another light, as it will diminish the annuity itself, which is contrary to the very words of the will. The annuity is either given over and above the dower, or in satisfaction of it. He intended only one, or he intended both ; if both, he intended both should be enjoyed in their full extent ; the whole annuity and the whole dower. Now, can the widow enjoy the annuity, as the will has given it, if she claims her dower ? It is most clear that she cannot ; for if she enters into a third, in right of her dower, she must sink so much of her annuity, as that third ought to bear in proportion : that is a violation of the will. And whether the annuity clashes with the dower, or the dower with the annuity, it is equally decisive ; for she can never enjoy both, unless both can be reconciled to the will, nor is there any pretence to say that the whole annuity, by an equitable marshalment, shall be thrown upon the two remaining thirds, because that would in terms contradict the will, which charges the whole, and gives the power of distress upon the whole. This is sufficient to shew the testator's intention : it is an intention that does not stand upon a loose presumption, but from the mode of devising in the will itself ; and then the

Tit. 38. c. 2.

Ante.

case comes within the rule of *Noys v. Mordaunt*, that no person shall dispute a will, who takes under it. This rule is universal, and without exception; and a dowress has no more right to be exempted from it than any other devisee. The cases of *Lawrence v. Lawrence*, *Hitchin v. Hitchin*, and *Lemon v. Lemon*, may be all admitted to be good law; the will in all these cases being consistent with the claim of dower. In all of them the dowable estate was devised generally; and as the testator had not expressed the wife's bequest to be in satisfaction, the Court would not presume it, and the estate passed, *cum onere*. There no violence was done to the will; and the wife took no more from the devisee than the testator intended she should; nothing being declared to the contrary. But where the dowable estate is so divided, that the claim of dower makes a material change in the will itself, as it does here, the widow must be barred by necessary implication. For where is the difference between declaring that she shall not hold both, and devising so that she cannot hold both, without disturbing the will: therefore, if the claim of dower will disappoint the will, she is barred of her dower by necessary implication: which will, according to the doctrine of all the cases, be equivalent to an express implication. I will now say a word upon the case of *Arnold v. Kempstead*. There is no power of distress in that will; and yet I do not think it substantially within the reason of the other two cases; for the very gift of an annuity to the wife, out of the dowable estate, does from the nature of the interest, throw her out of possession, and makes the claim of dower inconsistent with the will. I must not conclude without taking notice of a circumstance that may be urged against my opinion, as a proof of intention in the testator to give both dower and annuity to the wife; that is, that the annuity is made to issue out of more than the dowable estate; from whence it may be argued that the testator enlarged the fund for payment, in order to leave sufficient for the satisfaction of both the demands. I answer, first, that it is totally unknown whether he extended the charge and the remedy with that view; it is at most but a conjecture; and it may as reasonably be supposed that he meant only, by augmenting the security, to give an easier and safer remedy for recovering the annuity; as nothing is more common, where a rent-charge is

granted, than to charge an estate of ten times the value for the payment of it.

2. That this supposed intention is rebutted by a declared intention to the contrary, manifested and expressed in the will itself. I wish these cases could have been reconciled, feeling in myself a modest unwillingness to sit in judgment upon two men greatly superior to myself in learning, as well as capacity: but that which in a private man would have been presumption, is an indispensable duty in a judge. The tax is imposed on me by my office; and I undertake it with more ease of mind, knowing that there is a jurisdiction superior to us all, which is able to confirm or reverse my opinion, by a final decision. Decreed that the widow must make her election.

Jones v. Collier,
Amb. 750.
Wake v. Wake,
3 Bro.C.C. 255.
1 Ves. jun. 335.
Pearson v.
Pearson,
1 Bro.C.C. 292.
Boynton v.
Boynton, id.
445.
Miall v. Brain,
4 Mad. 119.

30. There are, however, several modern cases, where a devise of an annuity to a wife, either entirely or partly charged on the estates of which she is dowerable, together with the gift of those estates to another, or a devise of them to trustees, has been held not to be a satisfaction of dower, but the widow has been allowed to have both.

Foster v. Cooke,
3 Bro.C.C. 347.
French v.
Davies, 2 Ves.
jun. 572.
Strahan v.
Sutton, 3 Ves.
249. *Greator*
rex v. Carey,
6 Ves. 615.

31. A bequest of the residue of personal estate will not be considered as a bar to dower.

A bequest of
personal estate
no bar to dower.

32. A man, by his will, taking notice of his wife's title to dower, made a provision for her out of his personal estate by way of residue. This was insisted on to be an implication to bar dower. Lord Hardwicke rejected the idea; because by the claim of dower, the wife did not break in on the will; and this was the stronger as it was only a residue; which accidental benefit he might intend she should have, as well as dower. (b)

Ayres v. Willis,
1 Ves. 230.
See stat. 3 & 4
Will. 4. c. 105.
ss. 9. 10. 12.

(b) [It is now well settled that in order to deprive a widow of dower by putting her to election between it and the provisions made by her husband's will, it must be shewn that the testator meant to exclude her from it, as where there is an inconsistency between her claim to dower and the testamentary disposition.

A pecuniary legacy, personal annuity, or other benefit merely affecting the personal assets of the testator without any declaration that it shall be in bar of dower, does not raise an implication of intention on the part of the testator to exclude the widow's legal right, because there is no inconsistency between it and the bequest. *Strahan v. Sutton*, 3 Ves. 249. *Ayres v. Willis*, 1 Ves. sen. 230.

See Stat. 3 & 4
W. 4. c. 105.
s. 10.

But where the testator devises lands, or rents out of lands, in which the wife is dowerable, a presumption arises from that circumstance, though not of itself sufficient, that the testator intended the testamentary gift should be in lieu of dower. Notwithstanding this, however, the intention may yet be doubtful, and if so the widow will not be put to her election. The following is a chronological list of the principal cases of devises of

Ib. s. 9.

real estate subject to dower wherein the intention to exclude the wife was held not sufficiently apparent. *Lawrence v. Lawrence*, 2 Vern. 365. *Lemon v. Lemon*, 8 Vin. Ab. Devise P. 366. pl. 45. *Hitchin v. Hitchin*, Pre. Chan. 133. *French v. Davies*, 2 Ves. jun. 572. *Brown v. Parry*, 2 Dick. 685. *Strahan v. Sutton*, 3 Ves. 249. *Birmingham v. Kirwan*, 2 Scho. and Lef. 444.

1b. s. 9.

The devise of the annual rents or charges out of estates wherein the widow is dowerable has been considered such an equivocal manifestation of the testator's intention, as not to exclude the widow, right to dower. The cases upon this subject are conflicting. They occurred in the following order. *Pitts v. Snowden*, 1 Bro. C. C. 292, note. *Arnold v. Kempstead*, 2 Eden, 236. Amb. 466. S. C. *Villa Real v. Galway*, Amb. 682. *Jones v. Collier*, Amb. 730. *Pearson v. Pearson*, 1 Bro. C. C. 292. *Wake v. Wake*, 1 Ves. jun. 335. *Foster v. Cook*, 3 Bro. C. C. 347. *Greatorex v. Cary*, 6 Ves. 615.

Of these, *Pitts v. Snowden*, *Pearson v. Pearson*, *Foster v. Cook*, and *Greatorex v. Cary*, support the above proposition in favour of the widow's claim to both the dower and testamentary benefit. *Arnold v. Kempstead* is not to be reconciled with *Pitts v. Snowden*. *Villa Real v. Galway*, and *Jones v. Collier*, negated the widow's claim upon the peculiar wording of the wills, and *Wake v. Wake* was decided by Baller J. on the authority of *Jones v. Collier*, which is no authority for the general proposition that the annuity is of itself a sufficient bar to the wife's right.

The following cases of devises of real estate are instances wherein the intention to exclude the widow has been held sufficiently apparent, *Gosling v. Warburton*, Cro. Eliz. 128. *Boynton v. Boynton*, 1 Bro. C. C. 445. *Birmingham v. Kirwan*, 2 Scho. and Lef. 444. *Chalmers v. Storil*, 2 Ves. and Bea. 222. *Roberts v. Smith*, 1 Sim. and Stu. 513. *Dickson v. Robinson*, MS. Rolls 30th April, 1822, stated 1 Roper Husband and Wife, by Mr. Jacob, 580. *Miall v. Brain*, 4 Mad. 119. *Butcher v. Kemp*, 5 Mad. 61. *Reynolds v. Torin*, 1 Russ. 129. *Roadley v. Dixon*, 3 Russ. 197. and see *Coleman v. Jones*, 3 Russ. 312.

Testamentary provision expressly given in lieu of dower and thirds out of the real and personal estate of the husband, will not preclude the widow from claiming her distributive share of her husband's effects as next of kin. *Sympton v. Hornsby*, 11 Vin. 185. 2 Eq. Ca. Ab. 439. 2 Vern. 722. cited 3 Ves. 335. *Pickering v. Lord Stamford*, 2 Ves. jun. 272. 581. 3 ib. 332. 493.

The subject of the above note is discussed and the cases stated in detail by the Editor in his edition of *Roper's Legacies*, 2 Vol. 530—546.]

TITLE VII.
JOINTURE.

CHAP. I.

Of the Origin and Nature of Jointures.

CHAP. II.

Where a Jointress is aided in Equity.

CHAP. III.

What will operate as a Bar, or Satisfaction of a Jointure.

CHAP. I.

Of the Origin and Nature of Jointures.

SECT. 1. *Origin of Jointures.*

5. *Definition of.*
6. *Circumstances required.*
7. *Must commence on the Death of the Husband.*
9. *And be for the Life of the Wife.*
12. *Must be limited to the Wife herself.*
13. *This Rule not admitted in Equity.*
17. *It must be in Satisfaction of her whole Dowry.*
18. *And be so expressed or averred.*
21. *And made before Marriage.*
22. *Jointures which require the acceptance of the Wife.*
25. *Cases where the Widow takes the Estate and Dowry.*

SECT. 27. [*Equitable Jointures.*]

31. *Who may limit a Jointure.*
35. *Who may take a Jointure.*
36. *An infant is barred by a Jointure.*
40. [*An Infant not bound by uncertain or precarious Jointure.*]
41. *Nature of this Estate.*
42. [*Jointress may not commit Waste.*]
45. *Contribution by Jointress.*
46. *Jointress not entitled to Emblements.*
47. *Not Liable to Crown Debts.*]
48. *A Rent-charge is usually given as a Jointure.*
49. *Effect of the Eviction of a Jointure.*

SECTION I.

IN consequence of two maxims of the common law, First, that no right can be barred till it accrues; and, secondly, that no right or title to an estate of freehold can be barred by a collateral

Origin of jointures.
Vernon's Case.
4 Rep. 1.
Gilb. Uses, 147.

Tit. 32. c. 6.

satisfaction ; it was found impossible to bar a woman of dower by any assurance of lands, either before or during the marriage. For a wife having acquired a right to be endowed of a third part of all her husband's lands at the moment of her marriage, this right, like all others, could only be extinguished by a release ; and no such release of the wife, either before or during the marriage, would be valid. For, if before the marriage, it was no bar, because at the time of making it the woman had no title to dower ; and, therefore, a release from her then would be no bar to a right which accrued to her after. If it was made during the marriage it was absolutely void, the wife not being then *in jure* ; and no estate limited to the wife, during the marriage, could bar her of dower, because no right or title to a freehold estate can be barred by a collateral satisfaction.

3 Rep. 58. b.
4—1. b.

2. It followed that every woman became entitled upon her marriage to one-third of all her husband's real estates, however small her fortune might be. Such an inequality induced many persons to convey their lands to uses, a widow not being dowable of a use ; and when this practice became general, it was usual on all marriages for the parents of the lady to procure the intended husband to take an estate from his feoffees to uses, and to limit it to himself and his intended wife for their lives, in joint tenancy or jointure, lest the wife should be totally unprovided for at the death of her husband.

Tit. 11. c. 3.

3. When the Statute of Uses transferred the legal estate to those who were entitled to the use of the lands, all women then married would have become dowable of such lands as had been held to the use of their husbands ; and would also be entitled to any particular lands that were settled on them in jointure. But as this would have been a manifest wrong, the following clause was inserted in the Statute of Uses :

St. 27 Hen. 8.
c. 10. s. 6.

4. " Whereas divers persons have purchased or have estate made and conveyed of and in divers lands, tenements, and hereditaments, unto them and to their wives, and to the heirs of the husband ; or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten ; or to the husband and to the wife, for term of their lives, or for term of life of the said wife ; or where any such estate or purchase of any lands, &c. hath been or hereafter shall be made to any husband and to his wife, in manner and form above

expressed ; or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointure of the wife ; that then, and in every such case, every woman married having such jointure made, or hereafter to be made, shall not claim nor have title to have any dower of the residue of the lands, &c. that at any time were her said husband's, by whom she hath any such jointure ; nor shall demand nor claim her dower, of and against them that have the lands and inheritances of her said husband. But if she have no such jointure, then she shall be admitted and enabled to pursue, have, and demand her dower, by writ of dower, after the due course and order of the common laws of the realm."

5. This statute has given rise to the modern jointure, which Lord Coke defines to be " A competent livelihood of freehold for the wife of lands or tenements, &c. to take effect presently, in possession or profit, after the decease of her husband, for the life of the wife at the least, if she herself be not the cause of its determination or forfeiture."

Definition of.
1 Inst. 37. a.

6. As this statute contradicts the common law, it has always been construed strictly ; and Lord Coke has laid it down, that no estate limited to a woman shall be deemed a good jointure, and a bar to dower, under this act, unless it is attended with the following circumstances.

Circumstances
required.

7. And *first* it must commence and take effect, in possession or profit, immediately on the death of the husband ; for otherwise it will not be so beneficial as dower.

1. Must commence on the death of the husband.

If, therefore, an estate is conveyed to the husband for life, remainder to J. S. for life, remainder to the wife for life, in satisfaction of dower, this is not a jointure within the statute ; because by the first limitation it is not to take effect in possession or profit, presently after the death of her husband. And although in this case J. S. should die in the lifetime of the husband, still it would be no bar to dower.

1 Inst. 36. b.
4 Rep. 2. a.

8. So where a person covenanted to stand seised to the use of himself in tail, remainder to the use of his wife for life. This was held not to be a jointure, because it was to begin after the determination of an estate tail. And though the estate determined by the death of the husband, without issue, so that the wife's estate began immediately upon the death of her husband,

Wood v. Shirley,
Cro. Jac. 488.

Caruthers v. C.
4 Bro. C.C. 500.
5 Ves. 192.

2. And befor the
life of the wife.
1 Inst. 36. b.

Ante, s. 4.

Dyer 97. b.

4 Rep. 2. a.

Tit. Dower, 69.

248. a.
4 Rep. 3. b.

3. Must be
limited to the
wife herself.
1 Inst. 36. b.

This rule is not
admitted in
equity.

Bucks v. Drury,
3 Bro. P. C. 492.
infra, p. 195.
Jordan v. Sa-
vage, 2 Eq. Ca.
Ab. 101. *infra*.

yet as it was not a good jointure at the beginning, whatever happened afterwards could not make it good.

9. The *second* circumstance is, that it be for the wife's life, or for some greater estate. So that if an estate be limited to a woman, for the life or lives of one or more persons, or for a hundred, or a thousand years, if she lives so long, it is not a jointure. But although the statute recites five modes of limiting an estate in jointure, yet these are only mentioned as examples; and do not exclude any other estate consistent with the intention of the act.

10. Thus in the Duchess of Somerset's case, 1 Mary, it was resolved by all the judges, that an estate limited to a man and his wife, and to the heirs male of their two bodies begotten, was a good jointure within the statute, though not one of the estates mentioned in it. And in Vernon's case it was held that an estate limited to the husband for life, remainder to the wife for life, was a good jointure; though not one of the estates mentioned in the statute; because it was equally beneficial.

11. It is said in Brooke's Abridgment that an estate, limited to a husband and wife and their heirs, is not a jointure within the statute, because it is not one of the estates mentioned in it. But Dyer contradicts this position, and proves that it would be a good jointure, the words of the act being, "for term of life or otherwise in jointure," which word otherwise extended to all other estates conveyed to the wife, which were as beneficial, or more, as the estates mentioned.

12. The *third* circumstance is, that the estate must be limited to the wife herself, and not to any other person in trust for her. So that it was formerly held that if an estate was made to others in fee simple, or for the life of the wife, in trust, so as the estate remained in them, though for her benefit, and by her assent, yet it was no bar to dower.

13. Mr. Hargrave has observed on this passage, that though this may be true at law, yet it is now settled that a trust estate being equally certain and beneficial, as what is required at law, or even an agreement to settle lands as a jointure, is a good equitable jointure, and will be a bar to dower.

14. Thus in a modern case it was determined by the House of Lords, that a covenant from the intended husband that his heirs, executors, or administrators, would pay an annuity to his in-

tended wife, for her life, in case she survived him, in full for her jointure, and in bar of her dower, without expressing that it should be charged upon lands, was a good equitable jointure, within the statute. Lord Hardwicke answered the objection of its being in the husband's power to have defeated this agreement, and sold or given away his whole estate, by Lord Letchmere's and other cases, where the agreement rested, as here, upon the husband's covenant. And further, by observing that such an alienation would have been an eviction of the fund out of which the jointure was to arise, and consequently let the wife into dower.

9 Mod. 219.
4 Bro. C. C.
506. n.

Ca. temp.
Talbot, 80.

Infra.

To another objection, that the husband had not bound *himself* to do any act, but only that his heirs, executors, and administrators, should pay, &c. he answered, that the wife might, the day after the marriage, have brought a bill, by her next friend, and compelled the husband himself to settle the annuity.

15. By indenture made previous to a marriage, the intended husband and wife assigned leasehold estates for years belonging to each of them to trustees, in trust to permit the husband to receive the rents for life, after his decease to permit the wife to receive the rents for her life, in full for her jointure, and in bar of dower. The Court of Chancery held this to be a good equitable jointure.

Williams v.
Chitty. 3 Ves.
jun. 545.

16. In the case of *Tinney v. Tinney*, a sum of money secured by bond to the intended wife before the marriage was held to be a bar to dower. And in a case published by Mr. Cox, where the intended husband gave a bond to the mother of the intended wife, conditioned that he or his heirs would settle 500*l.* a-year in land on her, in satisfaction of dower; Sir T. Clarke, M. R., held it a good jointure. From which it appears that the courts of equity now consider any provision which a woman accepts before marriage, in satisfaction of dower, to be a good jointure.

Infra, s. 19.
Estcourt v.
Estcourt,
1 Cox. R. 20.

17. The *fourth* circumstance is, that it be made in satisfaction of the wife's whole dower, and not of a part of it only; for land conveyed to a woman in part of her jointure, or in satisfaction of part of her dower, is no bar, on account of the uncertainty.

Corbet v. Corbet,
1 Sim. & Stu.
612.
5 Russ. 254.

4. It must be
in satisfaction of
her whole
dower.
1 Inst. 36. b.

18. The *fifth* circumstance is, that the estate limited to the wife be expressed, or averred to be, in satisfaction of her whole dower. [And it ought to be so expressed in the instrument settling it; or it must appear by necessary implication from the

5. And be so
expressed or
averred.

9 Mod. 152. contents of the instrument.](a) But since the statute it appears somewhat doubtful whether an averment can be admitted that the provision made for a wife, previous to marriage, was intended as a jointure, and in bar of dower.

Tinney v.
Tinney, 3 Atk. 8.

19. On a bill brought for dower, the defendant the heir at law, insisted that the husband in his lifetime gave a bond in the penalty of 1000*l.* in trust to secure to his wife 500*l.* in case she survived: that it was intended at the time in lieu of dower; that she acknowledged it to be so, and offered to read evidence of her acknowledgment.

Tit. 32. c. 20.

Walker v.
Walker,
1 Ves. 54.
Couch v. Strat-
ton, 4 Ves. jun.
391.

Lord Hardwicke was of opinion that parol evidence could not be allowed in this case, being within the statute of frauds; and that a general provision for a wife was not a bar of dower, unless expressed to be so. That in the case of *Vizard v. Longdale*, 5 Geo. 1. Sir Joseph Jekyll held the words in a bond, to secure a sum of money for a woman's livelihood and maintenance, was no bar of dower; but that Lord Chancellor King was of opinion it was a bar of dower, being within the equity of the statute of Henry 8. of jointures, and therefore reversed the decree.

Infra, s. 25.

20. It is however observable, that there is nothing in the statute of frauds excluding averments; and it is generally understood, that whatever averments might have been made before that statute, may be made since. Now in *Vernon's* case, and an anonymous case, Owen 33, it was averred that the estate limited to the wife, was for her jointure; and in bar of dower; and the averment was allowed.

6. And made be-
fore marriage.
1 Inst. 36. a.
4 Rep. 3. a.

21. The sixth circumstance is, that it be made before marriage. For it is enacted by the ninth section of the statute, that if any wife have any manors, &c. assured to her after marriage, for term of life or otherwise, in jointure, except the same be made by act of parliament, the wife shall at her liberty, after the death of her husband, refuse the jointure, and demand her dower.

Jointures which
require the ac-
ceptance of the
widow.

22. A jointure, attended with all the circumstances above stated, is binding on the widow, and a complete bar to her claim of dower; or rather prevents her title to dower from ever arising. But there are other estates limited to a wife, which are good jointures within the statute, provided she accepts of them

(a) [See *Caruthers v. Caruthers*, 4 Bro. C. C. 500. See also *Garthshore v. Chale*, 10 Ves. 1. 20.]

after the death of her husband : though she is at liberty to reject them, and to claim her dower. Thus an estate settled on the wife after marriage may, by the express words of the statute, be rejected by the widow after her husband's death ; in which case she may claim her dower. But if she once accepts of such jointure, she is thereby bound.

23. An estate for life, limited to a woman for her jointure, upon condition to perform her husband's will, or which is determinable by a second marriage, is a jointure within the statute ; provided the wife accepts of it, after the death of her husband.

24. In a writ of dower the tenant pleaded that the husband of the demandant was also seised of lands in the same county, which he had conveyed to the use of himself for life, remainder to his wife for life ; and averred that the estate for life so limited to the demandant was for her jointure, and in full satisfaction of her dower ; and that after the death of her husband she had entered into the lands so limited to her for her jointure, and agreed to it. The demandant replied, and confessed the conveyance by which she took an estate for life ; but said that the estate was upon condition that she should perform her husband's will ; and demanded judgment if the tenant should be admitted to aver that this estate so limited to the wife, upon the said condition, was for the jointure of the wife, and in satisfaction of her dower ; upon which the tenant demurred in law. It was resolved that although the estate limited to the wife was upon condition ; and although dower, in lieu of which the jointure was given, was an absolute estate for life ; yet in as much as an estate for life upon condition was an estate for life, it was within the words and intent of the act, if the wife, after the death of the husband, accepted it ; therefore she was barred of her dower. It was also said, that an estate limited to a woman during her widowhood for her jointure, was good within the statute, if she accepted it.

Vernon's case,
4 Rep. 1.
Dyer 317. a.

25. It appears from the preceding cases, that there are two sorts of jointures within the statute. One which prevents the title to dower from ever arising ; another which, when accepted, but not before, becomes a bar to dower. Thus in Vernon's case it was said, that if the estate there limited to the wife was not within the statute, then it was no bar to dower ; but the demandant should have both. And Lord Coke says, that where the estate limited to the wife does not take effect immediately

Cases where the
widow takes the
estate and
dower.

4 Rep. 2. b.

1 Inst. 36. b.

on the death of the husband, in which case it is not within the statute, the widow shall take such estate, and dower also.

Copyhold not a legal bar to dower, though good in equity.

26. [Copyholds are not included in the 27 Hen. 8. c. 10. s. 6. so that a jointure of such lands is not *at law* a bar to dower; (b) neither for the same reason is a jointure *at law* a bar to the widow's right to freebench, (c) though it is in equity.

Equitable jointures.

27. In addition to the observations occurring in the course of the preceding sections, upon the subject of equitable jointures, some further remarks may be offered.

As legal jointures, made before marriage, if the woman be of age, will be binding after the husband's death, so also will equitable jointures so made: And as at law a jointure made after marriage, will not be obligatory upon the widow, after her husband's death, but will depend for its validity upon her acceptance; so neither, under similar circumstances, will equitable jointures be binding upon her, but require her confirmation.

28. A legal jointure, as before noticed, must commence in possession and profit immediately after the husband's decease; but an equitable jointure, made before marriage, the wife being a party to the deed and adult, will be equally binding upon her, though she thereby accept a more uncertain or disadvantageous provision; for by that agreement she will be absolutely barred of her common law right. (d) And notwithstanding the provision be not secured upon freehold estate (e); and although the jointure rest only on covenant. (f)

29. But if the provision be made after marriage, an equitable, as well as a legal jointure, may be accepted or rejected by the widow, after her husband's death. But there is this distinction; if the provision be not a legal jointure within the act, the widow is not at law put to her election, but will be entitled to both provisions: in equity, however, the rule is otherwise, for in every such case the widow is obliged to make her election between the equitable jointure and her legal right.

Caruthers v. Caruthers, 4 Bro. C. C. 513.

(b) Gladstone v. Ripley, cited 2 Eden. 59. 60.

(c) Walker v. Walker, 1 Ves. sen. 54. Jordon v. Savage, 3 Bac. Abr. 717. Bro. Edit. Warde v. Warde, Amb. 299. S. C.

(d) Caruthers v. Caruthers, 4 Bro. C. C. 513.

(e) Rose v. Reynolds, 1 Swan. 446. Vizard v. Longden, cited 2 Eden. 66. Lacy v. Anderson 1 Swan. 445. Gladstone v. Ripley, *ubi supra*.

(f) Sidney v. Sidney, 3 P. Will. 269.

30. It is not necessary that the provision in bar of dower should be expressly stated to be in bar of dower; it will be sufficient if it can be collected from the instrument that such was the intention.] (g)

31. It is not necessary that the estate limited as a jointure should proceed immediately from the husband; for if it comes through the medium of trustees, or of the demandant in a common recovery, it will be good. Who may limit a jointure.

32. A. bargained and sold lands to I. S. and I. N. to make them tenants to the *præcipe*, for the purpose of suffering a common recovery, which was duly had, to the use of A. and his wife, for her jointure. Resolved, that this was an assurance by A. himself, for the advancement of his wife. Bridge's case, Moor 718.

33. If the estate proceeds from the father of the husband, it will be good.

34. The father of the husband, in pursuance of articles, enfeoffed trustees before the marriage to the use of the intended wife for life; the question was, whether this was a good jointure, it not being made by the husband, nor of his lands. Held a good jointure. Ashton's case, Dyer 228. Melle's case, cited 4 Co. 4.

35. As a jointure is an estate limited to a woman in lieu and satisfaction of dower, it follows that all those who are capable of being endowed may take a jointure. Who may take a jointure.

36. It was formerly much doubted whether a jointure, settled on an infant before marriage, was a bar to dower. But it has been solemnly determined in the following case, by the House of Lords, with the concurrence of a majority of the judges, that such a jointure is good, and that the infant cannot waive it after her husband's death, and claim dower. An infant is barred by a jointure.

37. Sir Thomas Drury, previous to his marriage with Martha Tyrrell, who was then an infant, by indenture made between the said Sir Thomas Drury of the first part, the said Martha Tyrrell of the second part, and two trustees of the third part, agreed that the said Martha Tyrrell, in case the marriage took place, and she survived her intended husband, should have and enjoy an annuity of 600*l.* during her life, for and in the name of her jointure: and that the same should be accepted and taken by her in full satisfaction and bar of her dower: and Sir Thomas Drury covenanted Earl of Bucks v. Drury, 3 Bro. Parl. Ca. 492.

[(g) *Vizard v. Longdale*, cited 3 Atk. 8. 1 Ves. Sen. 55. 2 Eden. 60. Walker *v.* Walker, Belt. Supp. to Ves. Sen. p. 43. and cases there cited.]

with the trustees to pay the said annuity of 600*l.* This deed was executed by Sir Thomas Drury and Miss Tyrrell, in the presence of her guardian, who was a subscribing witness to it ; and the marriage was soon after solemnized, with the privity and consent of the guardian. Miss Tyrrell was only entitled to a portion of 2000*l.*

Sir Thomas Drury died intestate, being seised in fee of a considerable real estate, leaving two daughters. Lady Drury, upon the death of her husband, insisted that as she was an infant at the time of executing the aforesaid indenture, and at the time of the solemnization of her marriage, she was not bound to accept of the provision thereby made for her, but was entitled to dower. The two daughters of Sir Thomas Drury filed a bill in Chancery against Lady Drury, praying that she might be restrained from claiming dower.

The cause was heard before Lord Chancellor Henley, who decreed that Lady Drury was entitled to dower.

On an appeal to the House of Lords, it was contended by the appellants, that, by the statute 27 Hen. 8. no woman having a jointure settled on her before marriage, should claim or have title to dower ; so that, in all cases where jointures are made, the subsequent marriage, which at common law gave a title to dower, after this act gave no such title ; and the jointure is made a statutable provision for her, in lieu of the provision at the common law. It does not, therefore, depend on the consent of the wife, that the jointure takes away the right of dower, but, having the jointure, she never gains any title to dower. That this act gives no colour to the constructive exception of infants insisted on by the respondent. The words are general :—“ *Every woman married, having jointure made, shall not claim, nor have title to any dower.*” This includes infants, as well as adults ; and, if the parliament had meant to distinguish between the two cases, it would have been necessary to except infants, in express terms, and not to have left it to construction only ; for at the time of making this law, there must have been numerous instances of jointured infants ; and the single case in which it was probable that the wife might be injured by the influence and power of her husband, to bar her of dower by a jointure, was that of a jointure after marriage ; which case is expressly provided for by the act, that the wife, after the death of her husband, may

elect between the two rights. But if infants were not bound by their jointures, no especial provision being inserted in the statute, to compel them to an election, when the husband was seised of the legal estate in the land, they would take not only their dower, but their jointure also, which is contrary to the whole spirit of the act. It was never meant that any woman should have jointure and dower both. If infants had been excepted, that exception would have been to their disadvantage, by preventing their marriage. At that time, most ladies of fortune, particularly landed fortunes, were married before they were of age, by reason of the advantage which accrued from their marriage to the lords under whom the tenure was derived; and, in fact, women are most frequently married under age. But if they could not bar themselves, during their infancy, from claiming dower, by accepting jointures, such marriages could not prudently be had in families of wealth and rank. Dower, though a just and honourable provision for the wife, is a right inconvenient to the heir, preventive of the free use and improvement of his lands; and, in great estates, a far more ample provision than can be in reason demanded or expected. The Legislature, therefore, intended that all women capable of contracting marriage, should be bound by jointures made before marriage, which are presumed to be settled by the advice of parents, guardians, and friends; or, if made only with their own consent, by the husband fairly without fraud: still it was thought reasonable, that she, whom the law allowed to bind herself by the marriage, which is the principal contract, should be bound by a provision which is accessory to that contract, and a condition of it: that, according to this construction, the opinion of the lawyers had been uniform, that a jointure made before marriage upon an infant is a bar of dower; and, on this presumption, settlements had been made upon infants in many families of this kingdom. In the various instances of jointures made before marriage upon infants, none could be found, either in authority or experience, where it has been adjudged, or insisted, or yielded in fact, that a widow might waive a jointure before marriage, on account of infancy, and claim her dower. That the long unvaried practice of the Court of Chancery gives a full sanction to this construction of the statute, by directing, on every application for the marriage of an infant female ward of the Court, that a master should see a pro-

per settlement made on such infant by way of jointure: whence, it may be presumed, that the Court always understood that such settlement and jointure would be effectual and binding in law on both the parties; intending, at the same time, to leud its aid and judgment to the infant ward, as her best guardian and protector.

On the other side, it was contended, that, before the statute 27 Hen. 8. c. 10., no jointure made on a woman, though of the age of twenty-one years, was binding or conclusive on her, but she might waive such jointure, and claim title to a third part of the real estate which her husband was seised of or entitled to, in fee, or in tail, at the time of her marriage, and at any time during the coverture: but, since that act, a jointure made upon a woman of full age, previous to her marriage, is conclusive upon her, in case such jointure be made of lands and tenements to take effect in possession or profit presently after the decease of her husband, and be for the term of her own life, or a greater estate; or otherwise she has it in her election to take the jointure or dower; and so, likewise, if the jointure is made after marriage. That it was not to be conceived to have been the intention of this act, that a jointure made before marriage on a woman under age, should be binding and conclusive on her; as the law was then, and has ever since, continued to be clear and undoubted, that no conveyance or acceptance of any real estate, whether by or under a fine, recovery, or other deed could, or now can, bind an infant, either male or female; and if the Legislature had intended that an infant female should be bound by such a jointure made upon her before marriage, care would have been taken that so remarkable an alteration of the known law of the land should be clearly so expressed, especially as it must be agreed that this act is not binding on the husband of an infant making such jointure, but is absolutely void; and, when he comes of age, he may totally disavow the same. And there seems to be as much reason to suppose that the makers of this act intended, if any infants were to be bound at all, that both males and females should be equally so; and the Legislature would probably have made some provision, that jointures, made by or upon infants, should have been executed with such solemnities, and under such guards and cautions, as might have

effectually prevented any fraud or imposition, or been otherwise injurious to infants executing the same. That, if the doctrine of a female being in all events bound by that statute, though an infant of the age of twelve years perhaps, should once clearly be established, it might give occasion to the practice of great frauds, and be productive of the greatest mischiefs and inconveniences; for, in such a case, a man of a great real estate might engage an infant of twelve years old to marry him, and, by his settling of any small part of his real estate on her, by way of jointure, might bar her out of his estate, at the same time that he, in right of such marriage, acquired an absolute property in all her personal estate.

After hearing counsel on this appeal, the following question was put to the judges:—"Whether a woman married under the age of twenty-one years, having before such marriage a jointure made to her, in bar of her dower, is thereby bound, and barred of dower within the statute 27 Hen. 8. c. 10.?"

Mr. Baron Gould, Lord Chief Baron Parker, and Lord Chief Justice Pratt, delivered their opinions in the negative. But the rest of the judges, namely, Mr. Justice Wilmot, Mr. Justice Bathurst, Mr. Baron Adams, and Mr. Baron Smythe, delivered their opinions in the affirmative. Lord Hardwicke and Lord Mansfield also delivered their opinions in the affirmative, whereupon the decree was reversed.

Vide Sir E. Wilmot's Notes, 177.

38. The principle upon which this case was determined is that a jointure being *a provisione viri*, and not *ex contractu*, the consent of the intended wife is not a circumstance required by the statute, to render a jointure valid. Lord Mansfield, in delivering his opinion in the House of Lords on this case, said that a jointure was not a *contract* for a provision, but a *provision* made by the husband, as defined by Lord Coke; so the consequences drawn from the infant's incapacity of contracting were ill-founded. It is therefore now held that the intended wife need not be a party to the deed by which the jointure is limited. And in an opinion of the late Mr. Fearne's, he says, "I discover nothing in the statute 27 Hen. 8. of jointures, that requires the wife being a party to the deed which secures her jointure; and some of the cases said to be within that statute seem rather against such a conclusion."

4 Bro. C. C. 506. n. 2 Eden 60.

Jordan v. Savage, ante, 2 Ab. Eq. 101.

Estcourt v. Estcourt,
1 Cox. R. 20.

3 Atk. 612.

An infant not bound by uncertain or precarious jointure.

Nature of this estate.

Tit. 36. c. 10.

Jointress may not commit waste.
Bassett v. Bassett, Finch. 189.
Tit. 3. c. 2.

Cook v. Winford, 1 Ab. Eq. 221.

Carew v. Carew,
1 Ab. Eq. 221.

39. It is however necessary, I conceive, that the intended wife, or, where she is under age, that her guardians, (g) should have notice of the jointure limited to her; for otherwise she may be defrauded by the settlement of a jointure inadequate to her rank and fortune; in which case there can be no doubt but that she would be relieved in equity.

40. [If the interest in the property settled by way of jointure or the amount of the property itself, be uncertain or precarious, of course the infant will not be bound, as under such circumstances the jointure would not be binding upon an adult. (h)]

41. We have seen that an estate in fee, in tail, or for life, may be limited to a woman for her jointure. In case of a limitation in fee, I conceive that a jointress would have full power to dispose of it as she pleased. But where an estate tail is limited to a woman for her jointure, she is prohibited by the statutes 11 Hen. 7. c. 20., (i) and 32 Hen. 8. c. 36. from alienating or creating a discontinuance of it by feoffment, fine, or recovery.

42. Where lands are limited to a woman for her life, by way of jointure, she is not allowed to commit waste; and will be restrained from it by the Court of Chancery, in the same manner as other tenants for life.

43. On a motion to stay a jointress, tenant in tail after possibility, &c. from committing waste; the Court held, that as she was a jointress within the statute 11 Hen. 7. she ought to be restrained, being part of the inheritance, which by the statute she is prevented from alienating; and therefore granted an injunction against wilful waste.

44. Where there is a covenant that a jointure shall be of a certain yearly value, though the estate be not limited without impeachment of waste, yet the Court of Chancery will not restrain the jointress from committing waste, so far as to make up the defect of the jointure.

(g) [It does not appear that the concurrence of guardians is indispensable if the jointure be in other respects free from legal objections. *Drury v. Drury*, *ubi supra*. *Williams v. Chitty*, 3 Ves. 545—551.

(h) *Caruthers v. Caruthers*, 4 Bro. C. C. 500. *Smith v. Smith*, 5 Ves. 189. *Corbet v. Corbet*, 1 Sim. & Stu. 612. 5 Russ. 254.

(i) The above statute 11 Hen. 7. c. 20. is repealed, (except as to lands in settlement before the 28th August, 1833,) by the recent statute for abolishing fines and recoveries, 3 & 4 Will. 4. c. 74. ss. 16, 17.]

45. Where the jointress and the issue claim under the same settlement, they shall contribute proportionably in the discharge of any prior incumbrance on the estate.

Contribution.
Carpenter v.
Carpenter,
1 Vern. 440.

46. A jointress is not entitled to the crops sown at the time of her husband's death; because a jointure is not a continuance of the estate of the husband, like dower.

Not entitled to
Emblements.
Fincher v. Feobes,
9 Vin. Ab. 373.

47. It appears from a passage in Jenkins(k) that an estate limited to a woman by way of jointure is not liable to debts due to the crown.

Not liable to
Crown debts.

48. The inconveniences attending a limitation of land by way of jointure are so numerous, that it has long become a general practice to limit a rent charge to the intended wife, for her life, as a jointure, to commence on the death of the husband, with powers of distress and entry, and a term for years, for further securing the payment of it, which has been found by experience to be much more convenient both to the widow and to the heir; as a more certain income is thereby provided for the former, and the latter continues in the possession and management of the whole estate.

A rent charge
is usually given
as a jointure.

49. There is a proviso in the statute 27 Hen. 8. c. 10. s. 7. "That if any such woman be lawfully expulsed or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, or by discontinuance of her husband; then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expulsed shall amount or extend unto."

Effect of the
eviction of a
jointure.

50. A person, in consideration of a marriage before had, covenanted to stand seised to the use of himself and wife, during their natural lives, and the life of the longest liver. The lands were evicted during the life of the husband; it was held, that the eviction during the coverture was sufficient to entitle the wife to a recompence, though she had accepted the residue of the jointure after the death of her husband.

Gervoye's case,
Moo. 717.

51. A jointure was settled before marriage; the husband, during the coverture, purchased other lands, sold them again, and died. The jointure lands were evicted; held, that the wife should have dower of the lands which were purchased, and aliened by her husband, at the time when she was barred of her action for dower.

Maunsfield's
case, 1 Inst.
33 a. n. 8.

Gervoy's case,
supra, 1 Vern.
 427. Beard v.
 Nutthall.
 1 Vern. 427.

52. [This right of the widow upon eviction is the same, whether the jointure is before or after marriage.

1 Sim. & Sta.
 620.

1 Vern. 427.
 3 Bro. C.C. 489.
 1 Ves. jun. 451.
 4 Co. 3. b.

53. The effect of eviction is to remit her to her dower *pro tanto*; if the value of the dower be greater than that of the jointure, she can recover only the amount of the latter; and if the jointure be greater, she can only recover to the amount of her dower; and she will only be entitled to hold the lands recovered during life, though the jointure might have been settled in fee or in tail.

Simpson v.
 Gutteridge,
 1 Mad. 609.

54. But if the jointure were settled before marriage, and the wife, being adult, relinquishes her dower; in case of eviction she would, in equity, be precluded from claiming it against a purchaser of other lands of the husband not charged with the jointure.

2 Eden, 68.
 3 Bro. C.C. 489.
 1 Ves. jun. 452.
 Beard v.
 Nutthall, *ubi*
supra

55. The consequences of eviction of equitable jointure seem to be the same as if it were legal. The widow also in case of eviction may avail herself of any remedies she may have against her husband's assets by covenant or otherwise.]

CHAP. II.

Where a Jointress is aided in Equity.

SECT. 1. *A Jointress is deemed a Purchaser.*

- 4. *Though the Settlement be unequal.*
- 7. *Relieved against a voluntary Conveyance.*
- 8. *[Not against a bonâ fide Purchaser without notice.*
- 9. *Relieved where a Power to Jointure defectively exercised.]*

SECT. 10. *And against a satisfied Term.*

- 11. *Not bound by neglect during the Coverture.*
- 14. *Nor to deliver Title Deeds.*
- 17. *Sometimes allowed Interest for Arrears.*
- 18. *Effect of a Covenant that the Lands are of a certain Value.*

SECTION I.

A JOINTRESS is considered in equity as a purchaser for valuable consideration, even though she brought her husband no fortune; marriage alone being deemed a valuable consideration, from which it follows that a jointress is entitled to the aid and assistance of a court of equity; so that wherever there appears to have been an agreement to settle a jointure, a specific performance of it will be decreed.

2. A man agreed, by articles, to settle certain lands before marriage, on his intended wife, for her jointure. The marriage took effect, but the husband died before any settlement was made; the wife brought her bill for an execution of the articles. It was contended, that as the agreement was to make a settlement *before* marriage, and as the plaintiff married without requiring such settlement, it amounted to a waiver of the articles, and a release in law; an execution of them was however decreed.

3. Lord Hardwicke has said, that in marriage contracts, where the fortune of the wife is paid to the father, or to clear incum-

A jointress is deemed a purchaser.

Hayner v. Hayner,
1 Vent. 343.
Coventry v. Coventry,
2 P. Will. 222.

1 Atk. 440.

brances, or to the son ; and the father and son are parties to the marriage contract ; the wife has a lien upon both the estate of the father, and that of the son.

Though the settlement be unequal.

4. Although a settlement be very unequal, and much in favour of the wife, yet a court of equity will not relieve against it ; because it cannot put the wife into her former situation.

Whitfield v. Taylor, Show. Parl. Ca. 20.

5. A., upon treaty of marriage with M. the daughter of B., was to settle 500*l.* a-year upon her, and to have 5,000*l.* portion. But B. insisting that if A. should die without issue, his daughter should have the inheritance of the jointure, that was refused. Afterwards A. renewed the treaty himself, *accepted* of articles for payment of 5,000*l.*, and settled a jointure of 500*l.* a-year. He likewise made another deed in the nature of a mortgage of all his estate, as well the reversion of the jointure, as the rest, for securing the payment of 5,000*l.* to her, in case A. died without issue. A. died in a fortnight after the marriage, without issue. M. by bill prayed a foreclosure of the mortgage. The defendants, though they exhibited their bill for relief against this as a fraud, were decreed to pay the 5,000*l.* without interest.

Upon an appeal to the House of Lords, it was argued that A. was a sickly and weak man, that the agreement was unreasonable, that A. on his deathbed declared he had made no such agreement, and that M., being present, did not contradict it. To which it was answered, that all bargains were not to be set aside, because not such as the wisest people would make : but there must be fraud to make their acts void. That the marriage was of itself a good consideration for a jointure ; and reasonable or unreasonable was not always the question in equity, if each party was acquainted with the whole, and meant what they did : much less was it sufficient to say that it was unreasonable, as it happened in event. For if at the time it was a tolerable bargain ; nay, if at the time, the bargain was the meaning of the parties, and each knew what was done, and there was no deceit upon either, it must stand. The decree was affirmed.

Wicherly v. Wicherly, 2 P. Wms. 619.
Prime v. Stebbing, *infra*, c. 3. s. 11.

6. A person brought a bill to be relieved against a jointure, made previous to, and in consideration of marriage, by a tenant for life, in pursuance of a power, he being then upon his deathbed. Lord Parker, assisted by Lord Chief Justice Pratt and the Master of the Rolls, denied relief.

7. A jointress will be relieved in equity, as also at law, against a prior voluntary conveyance; because, as has been already stated, she is considered as a purchaser for a valuable consideration. And by a statute which will be stated in a subsequent Title, all voluntary conveyances are declared fraudulent and void as against such purchasers.

Relieved against a voluntary conveyance.

Tit. 32. c. 28. s. 2.

8. [But equity will not decree the performance of an agreement to settle a jointure upon the wife against a *bonâ fide* purchaser for a valuable consideration, without notice; because he has equal equity with herself, and has obtained the legal interest in the estate.

But not against a *bonâ fide* purchaser without notice.

2 Vern. 271. 599. 2 P. Will. 681. 1 Atk. 571. 2 Bro. C. C. 66.

9. Where a power to jointure is defectively executed, Courts of Equity will relieve the jointress, by supplying the defects in the execution; and it is immaterial whether the intent to execute the power be by letter, memorandum, will, articles, or covenant. (a)

Defective execution of powers to jointure relieved.

But if the intent to execute the power be uncertain, Courts of Equity will not interfere; since evidence of such intention, is as necessary in the defective, as it is in the regular execution of a power.]

Jackson v. J. 4 Bro. C. C. 462. Elliot v. Hele, 1 Vern. 406. 2 Ch. Ca. 28, 29. 87.

10. A Court of Equity will also set aside a satisfied term for years in favour of a jointress, though it will not do so in favour of a dowress, the reason of which will be stated in a subsequent title.

And against a satisfied term.

Tit. 12. c. 3. s. 39, &c.

11. The neglect of a married woman during coverture will not affect her rights; and a Court of Equity will notwithstanding assist her, in case her jointure proves deficient.

Not bound by neglect during the coverture.

12. The plaintiff's husband after marriage entered into a voluntary bond to settle a jointure; and accordingly settled lands, upon which the bond was delivered up. The husband died, and the jointress was evicted. It was resolved that the jointure should be made good out of the personal estate, unless the plaintiff recovered dower; for this agreement, though voluntary, ought to be decreed by the Court. And the delivery up of the bond by a feme covert could no way bind her interest.

Beard v. Nuttall, 1 Vern. 427.

13. A person made a settlement on his son for life, remainder to his first and other sons in tail, with power to appoint any of

Fothergill v. Fothergill, 1 Ab. Eq. 222.

(a) [Tollet v. Tollet, 2 P. Will. 490. Sergeson v. Sealey, 2 Atk. 415. Wade v. Paget, 1 Bro. C. C. 363. 2 Ball & B. 44. Coventry v. C. 2 P. Will. 222. Vernon v. Vernon, Amb. 1.]

the lands, not exceeding 100*l.* a year, to any wife he should marry, for a jointure. The father died, the son married, and after marriage, appointed certain lands to trustees, in trust for his wife, for a jointure; and covenanted, that if they were not of the value of 100*l.* a-year, he would, upon request made to him any time during his life, make them up out of the other lands. The husband lived several years; no complaint was made that the lands were not of that value, nor any request to make it up. On a bill brought by the widow to have the jointure made up 100*l.* Lord Keeper Wright said, that a provision for a wife, or children, was not to be considered as a voluntary covenant; and therefore decreed the deficiency to be made up, notwithstanding the wife's neglect in not requesting it during the coverture; for the laches of a feme covert could not be imputed to her.

Nor to deliver
up title deeds.
Towers v.
Davys,
1 Vern. 479.

supra p. 107.
and note.

14. If a bill is brought by an heir at law, or any other person, against a jointress, whereby the party would avoid the jointure, under pretence that his ancestor had not a sufficient title to make it: and seeks a discovery of deeds and writings, whereby he would avoid the title of the jointress; he will not be allowed to have such discovery, though the jointure be made after marriage, unless he by his bill submits to confirm the title of the jointress; and then he shall.

Lomax v. —
Sel. Ca. in
Cha. 4.

15. On a motion that all deeds, leases, and writings, relating to the inheritance, should be delivered up, on confirming a jointure; it was opposed as to the leases, because without them the jointress could not recover the rents; and though the leases should be expired, there might be arrears of rent, and covenants. The Court ordered all deeds and writings, and expired leases, to be delivered up; unless particular reasons were shewn to the contrary.

Leech v.
Trollop,
2 Ves. 662.

16. The Court of Chancery will not oblige a widow to produce the deed under which she claims her jointure, on the bare offer of confirming it; but it must be absolutely confirmed.

Sometimes al-
lowed interest
for arrears.
Anon. 2 Ves.
261. see
2 Ves. jun. 167.
Tew v. Win-
terton, 1 Ves.
jun. 451.

17. Interest is not in general allowed for arrears of a jointure: but the Court will expect a special case to be made for that purpose. (*b*)

(*b*) [See Lord Redesdale's observation upon this subject in *Anderson v Dwyer*, 1 Scho. & Lef. 303.]

18. If a husband covenants that the lands limited in jointure are of a certain yearly value, and they afterwards prove deficient, the covenant will be decreed to be performed in specie. And although such a covenant be inserted in articles only, and not in the settlement made in pursuance of them, yet it will be considered as subsisting in equity.

Effect of a covenant that the lands are of a certain value.

19. A jointress brought her bill to have an account of the real and personal estate of her late husband ; and to have satisfaction for a defect of value of her jointure lands ; which he had covenanted to be, and to continue, of a certain yearly value. The defendant insisted that this was a covenant which sounded only in damages, and was therefore properly determinable at law. Though it was admitted that a court of equity cannot regularly assess damages, yet it was determined that in this case a master might properly inquire into the amount of the defect, and report it to the Court, which might send it to be tried at law, upon a *quantum damnificat*'.

Hedges v. Everard,
1 Ab. Eq. 18.

20. Where lands settled for a jointure are covenanted to be of a certain clear yearly value, and after the death of the husband they prove deficient, the jointress is entitled to have the deficiency made good, out of the other lands ; and to come in as a specialty creditor, upon the husband's estate, for the arrears of the deficiency, with interest.

Parker v. Harvey,
2 Ab. Eq. 241.
4 Bro. Parl. Ca. 604.
Eustace v. Keightly,
4 Bro. Parl. Ca. 588.

21. Where, in marriage articles, the lands agreed to be limited in jointure are expressed, but not covenanted, to be of a certain yearly value, and afterwards prove deficient ; this amounts to an agreement that they were of that value ; and is a sufficient foundation for making up the deficiency.

Glegg v. Glegg,
2 Ab. Eq. 27.
4 Bro. Parl. Ca. 614.
Probert v. Morgan,
1 Atk. 440.

CHAP. III.

What will operate as a Bar or Satisfaction of a Jointure.

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| <p>SECT. 1. <i>Fine or Recovery by the Wife.</i>
 3. <i>Not barred by Attainder of the Husband.</i>
 4. <i>Nor by Elopement of the Wife.</i>
 7. <i>A Devise is no Bar to Jointure.</i></p> | <p>SECT. 13. <i>Unless so expressed, when the Widow has an Election.</i>
 15. <i>A Devise sometimes held a Satisfaction.</i></p> |
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SECTION I.

Fine or recovery
by the wife.

3 & 4 Will. 4.
c. 74.

Tit. 6. c. 4.
s. 14.

1 Inst. 37 a.
Dyer, 358 b.

Ante, c. 1.

WHERE a jointure is settled on a woman before marriage, pursuant to the statute, it so far resembles dower, that it cannot be defeated by the alienation of the husband alone, or be charged with any incumbrance created by him, after the marriage. But if a wife, [before the late statute for abolishing fines and recoveries, (a)] joined with her husband in levying a fine, or suffering a common recovery, of the lands settled on her as her jointure, or out of which the jointure was to issue, she would be thereby barred of such jointure, upon the same principle as that by which a fine or recovery would bar her of dower.

2. If the jointure whereof the wife levied a fine or suffered a recovery, were made before marriage, the wife would then be barred, not only of the jointure, but also of her claim to dower. But if the jointure were made after marriage, a fine or recovery by the husband and wife, of such jointure, would not bar the wife of her right to dower. For in the first case, the jointure having been made before marriage was not waivable; whereas in the second case it was waivable, and the time of her election came not till after the death of her husband; so that she might claim her dower in the rest of his lands.

(a) This act does not extend to Ireland except where expressly mentioned.

3. A jointure is in several cases more favoured in law than dower; for although the husband commit treason or felony, yet his widow will be entitled to her jointure. But if the widow be attainted of either of these crimes, she will lose her jointure.

Not barred by attainder of the husband. 1 Inst. 37 a. and see stat. 54 G. 3. c. 145.

4. A jointure is not barred or forfeited by the elopement of the wife from her husband, and her living in adultery, nor will these acts even preclude her from obtaining relief in equity.

Nor by elopement of the wife.

5. A woman brought a bill against her husband, for a specific performance of her marriage articles, whereby he had agreed that a jointure should be settled on her. The defendant answered that the plaintiff had withdrawn herself from him, lived separately, and very much misbehaved herself. It was proved that the plaintiff did elope from her husband, and went with another man to a cottage about three miles from her husband's house; since which there had been no pretence of a reconciliation. So that this was a bar of dower at common law; therefore equity ought not to assist such a woman.

Sidney v. Sidney, 3 P. Wms. 269

Tit. 6. c. 4. ss. 5—10.

Lord Talbot observed, that the fact of adultery was not put in issue, the accusation being only general and uncertain. But the articles being that the husband should settle such and such lands in certainty upon his wife, for her jointure, this was pretty much in the nature of an actual and vested jointure; as what was covenanted for a good consideration to be done, was in most respects considered in equity as actually done; consequently this was a jointure, and not forfeitable, either for adultery or elopement. The reason why a wife forfeited her dower by an elopement with an adulterer, and yet the husband did not, by leaving his wife, and living with another woman, forfeit his estate by the curtesy, was, because the statute of Westminster 2. does by express words create a forfeiture in the one case, and not in the other. Decreed that the husband should perform the articles.

6. In a modern case, where a bill was filed by trustees, praying a performance of marriage articles, the husband resisted, so far as the articles made a provision for the wife; alleging and proving that she lived separate from him, in adultery.

Blount v. Winter, cited 3 P. Wms. 277.

Lord Thurlow was of opinion that this was not a reason for non-performance of the articles, as to the wife. Decreed accordingly.

See also Sea-grave v. Sea-grave, 13 Ves. 439. 443.

A devise is no
bar to a jointure.
Tit. 6. c. 4.
ss. 18, 32, and
note (b).

Grove v. Hook,
4 Bro. Parl.
Ca. 593.

7. The principles laid down in the preceding title as to the effect of devises in barring dower, have been adopted with respect to jointures. So that a general devise of other lands, or of personal property, by a husband to his wife, [would not, before the late statute for amending the law of dower,] operate as a bar to jointure, settled on the wife; either before or after marriage. (a)

8. Upon the proposal of a marriage between Sir Hele Hook, who was then only seventeen years of age, and Esther, the daughter of Edward Underhill, Esq. certain articles were entered into by Mr. Underhill and Mr. Thompson, who was Sir Hele's guardian, and one of his father's executors, whereby Underhill covenanted to pay 1000*l.* on the day of marriage: and if Sir Hele should, within six months after he attained his age of twenty-one, settle lands of inheritance of 500*l. per annum* in Warwickshire, to the use of himself for life, remainder to the said Esther, his intended wife, for her life, in lieu of dower, remainder to their first and other sons in tail male, remainder to the right heirs of Sir Hele, that then Underhill would pay Sir Hele the further sum of 3000*l.*, and would also convey a farm in Worcestershire, and several houses in London of the yearly value of 220*l.*, to certain uses therein mentioned.

The marriage was soon afterwards had; and when Sir Hele came of age, he, by indentures of lease and release, dated in 1687, conveyed all the said manors and lands in Norfolk, Warwick, and Gloucester, to trustees, to the following uses: viz. As to Shelford and other particular parts of the premises, to the use of himself for life, remainder to dame Esther for life, for her jointure, and in bar of dower; remainder to their first and other sons in tail male; remainder to Sir Hele in fee. Mr. Underhill at the same time executed a conveyance of the Worcestershire estate and houses in London to the uses of the articles; and also paid Sir Hele the 3000*l.* in performance of the covenant. The yearly value of the lands so settled on dame Esther for her jointure was 783*l.*, which was considerably more than what was stipulated for by the articles. Some years after, Sir Hele, looking over his father's settlements and will, discovered that the demesnes of Shelford, part of his lady's jointure, were settled upon his mother, who was then living. He was also advised that in

(c) [But as regards dower in respect of devises of real estate to the widow, the law is now altered. See stat. 3 & 4 Will. 4. c. 105. ss. 9, 10. *supra*. p. 161, note.]

case of his death without issue, the whole of his lady's jointure might become void, and therefore he, by a deed poll, dated 1705, in pursuance of a power reserved to him in a settlement made by his father, appointed certain lands of about 240*l.* *per annum*, to the use of dame Esther for life, as an additional jointure; but expressly declared the same to be in recompence of all deficiencies either in title or value, of any estate on her before settled, or agreed to be settled, in consideration of their marriage.

In 1709 Sir Hele made his will, and thereby gave his wife a legacy of 4000*l.* and all his money, plate, jewels, household stuff, and other goods and furniture; he also devised to her several houses and lands of the yearly value of 200*l.* and upwards, for her life; and appointed her and one Grove executors, and residuary legatees.

712. In 1782 Sir Hele died without issue; and not having suffered a recovery of the estates comprised in the settlement of 1687, his sisters became entitled thereto, under a settlement made by their father; so that dame Esther was defeated of her jointure. Whereupon she exhibited her bill in Chancery against Sir Hele's sisters and executor, in order to compel them either to confirm her jointure, or to assign her dower by way of recompence out of all the lands whereof Sir Hele was seised in fee simple, or fee tail, during the coverture; according to the proviso of the statute 27. Henry 8. c. 10.

The defendants by their answer, insisted upon their title to the premises by virtue of a settlement made by their father, and also insisted that the additional jointure limited to her, and the other lands and legacies given her by Sir Hele's will, which were above double the value of her jointure, were intended and ought, in a court of equity, to be deemed a full recompence for her jointure. The defendants also exhibited a cross bill against dame Esther, for a discovery of the settlements and wills in her custody; of the value of the lands settled on her by the second jointure; and of the several estates and legacies given her by Sir Hele's will; to which she, by her answer, admitted that the value of the lands comprised in her second jointure, was 233*l.* *per annum*, besides the woods; and that the pecuniary and specific legacies given her by the will amounted to 6,400*l.* and upwards; but insisted, that in case the original jointure should

be defective, she was entitled to dower, under the statute 27 Hen. 8.

Both these causes were heard before Lord Harcourt in 1713, who declared that the settlement made by Sir Hele Hook upon dame Esther in 1687, becoming void by the death of Sir Hele without issue, she ought to have a jointure made good to her, according to the articles made on her marriage. And therefore decreed, that the defendants, the heirs at law of Sir Hele, should convey to dame Esther for her jointure, during her life, out of the estate whereof Sir Hele was seised in fee or fee tail, lands of the value of 500*l. per annum*; which lands so to be settled were to be above and besides the premises limited and appointed to her by the deed of 1705; the premises devised to her by Sir Hele's will; and those particular premises which she claimed by virtue of her marriage articles, and the conveyances made by her father in pursuance thereof.

From this decree the defendants appealed to the House of Lords, insisting that the respondent was not entitled to a specific execution of her marriage articles; nor to have her jointure of 500*l. per annum* made good to her, by the aid of a court of equity: for she had received a very ample recompence and satisfaction for the same, by the lands limited to her by the deed of 1705, which were expressly declared to be in recompence of all deficiencies, either in title or value, of any of the lands before settled or agreed to be settled upon her, in consideration of the marriage; and also by the other lands, estates, and money legacies given by Sir Hele's will. And if the 500*l. per annum* should likewise be made good to her, she would have, in land and houses, double the value of her intended jointure, besides the 4000*l.* in money, and the specific legacies. That if the respondent ought to be considered as a creditor in a court of equity, because of the breach of covenant in the marriage articles; and if the estate of the appellants ought to be subjected in equity to make good such breach; yet she ought not to take what was settled upon her by the deed of 1705, and what was given her by her husband's will, merely as a gift or bounty; and at the same time insist upon a satisfaction for breach of the covenant; for a voluntary gift or legacy which surmounts the value of a debt, ought to be taken as a satisfaction of such debt, unless where there is an express declaration to the contrary.

On the other side, it was argued, that the respondent's marriage portion, agreed upon by the articles, amounted in money and lands to 6000*l.*, for which it was thereby agreed she should have 500*l. per annum* for her jointure. And though, in respect of her father's bounty and kindness after the marriage, Sir Hele was pleased, when he came of age, to settle an estate for her jointure which amounted to 783*l. per annum*, yet the decree had given recompence for no more than 500*l. per annum*. That Sir Hele never apprehended or imagined that there was any defect of title, by reason of the want of a common recovery; for if he had, he could easily have supplied that defect: but it was plain he thought a fine sufficient; which fine was accordingly levied at the time of his making the second jointure: and neither the respondent or her father, or those concerned for her, had ever any notice of the title of the appellants in the lifetime of Sir Hele. That besides the respondent's marriage portion of 6000*l.*, Sir Hele received by the death of her father and mother to the value of 1000*l.* more. Besides which, the respondent had freely given him the inheritance of her father's real estate, which she was solely entitled to; and also the remainder of his leasehold estate: and therefore it was but reasonable that she should have the benefit of the law respecting her additional jointure of 233*l. per annum*; especially since Sir Hele intended her upon the first settlement 783*l. per annum*, which by the decree was reduced to 500*l. per annum*. That the legacies and bequests in his will were intended by him as a bounty, and not in satisfaction for the defect of her jointure, which he knew nothing of; and therefore considering he had so great a fortune with the respondent, it was hoped, that what he had so left her would be thought no unreasonable bounty; especially since he had left the appellants and their issue the reversion of all his estate of inheritance after the respondent's death, part of which came to him by the respondent. And as the whole of the jointure settled upon her would by virtue of the fine have been good, in case he had not died without issue, there could be no reason why a less jointure should not be made good against collateral heirs. The decree was affirmed.

9. A man on his marriage gave a bond to a trustee in the penalty of 4,000*l.*, conditioned that if he, at any time within four months, should settle and assure on his wife freehold lands of the yearly value of 100*l.*, then the bond to be void. The hus-

Eastwood v.
Vincke,
2 P. Wms. 613.

band soon after the marriage made his will, devising thereby freehold and copyhold lands, lying intermixed in Norfolk, to his loving wife and heir heirs; and died within four months after her marriage.

Master of the Rolls—"As money and lands are things of a different nature, the one shall not be taken in satisfaction of the other. Whatever is given by a will is *prima facie* to be intended a bounty and benevolence; and it is remarkable that in the present case the devise is to his loving wife, which is a term of affection. The devise of such of the land as is copyhold cannot possibly be towards satisfaction of the 100*l. per annum*, which was to be freehold: nay, supposing the whole 88*l. per annum* were freehold, it would not go towards satisfaction of the 100*l. per annum*; not being so expressed. And supposing there were assets to pay all the bond debts, and likewise the charges laid by the will on the land, in such case the 88*l. per annum* should be enjoyed as a bounty and benevolence."

Probert v.
Morgan and
Clifford,
1 Atk. 440.

10. A father and son, upon the marriage of the son, covenanted that the lands settled on the son's wife, for her jointure, were worth 300*l. per annum*. The son gave by his will a legacy of 1,000*l.* to his wife. On a bill brought by the wife to have a deficiency in her jointure supplied out of the assets of her husband and of his father, and also for the legacy of 1,000*l.*, Lord Hardwicke held that the legacy of 1,000*l.* given by the will ought not to be considered in this case as a satisfaction for the deficiency of her jointure, because that did not arise till after his death, and therefore could not at the time be in his consideration; and as the jointure lands were covenanted by the marriage settlement to be worth so much, clear of all reprises, the testator plainly intended the 1,000*l.* as a bounty for her.

Prime v.
Stebbing,
2 Ves. 409.

11. John Sheppard having by his marriage articles covenanted that the lands settled on his wife were of the annual value of 1,600*l.* above all incumbrances, made his will in these words: "I do hereby ratify and confirm my marriage articles; and I do also give to my wife the lands in A. B. for life." The wife and her second husband brought a bill to have a deficiency in her jointure lands supplied, which was not disputed: but it was insisted that the lands devised should be taken instead thereof.

Lord Hardwicke said—"If a husband upon his marriage, in consideration of a disparity of years, or any other personal con-

sideration, will make a very large settlement; the parties claiming under it, whether wife or children, are entitled to have it carried into execution, according to the intent. The defendants do not dispute but that, notwithstanding the largeness of the settlement, the plaintiffs are entitled to have any deficiency of jointure, on the foot of the covenant, supplied and made good; but insist that the Court ought to consider, and according to the rules established, to allow the lands devised to be either a satisfaction or performance, or at least a part performance of this contract; and to go so far as they may, in point of value, to make up the deficiency. If the Court can in any case do that, they ought in this. But I am of opinion, that if allowed in this case, I should make a precedent not agreeable to the rules established, and which might be of ill consequence and inconvenience in other cases; the same rule of justice must therefore prevail in this as in others. The husband was bound by his contract to make the jointure then settled to the value of 1,600*l.* a-year: this was therefore what she had a right to as a purchaser; and whatever arose from thence was her own estate, which she was entitled to as a debt from her husband to her. Then to consider what he has done by his will. In the very first clause he seems anxious for, and to take care of her; therefore it cannot be imagined that he intended to prejudice her. The husband's covenant that these lands are of such an annual value does amount to a covenant on his part to settle and make good to that extent, in case of deficiency, for she might have damages; therefore it has been argued, that when the husband by his will has given lands of the same, or in part of the value, that is so far a performance of his covenant; for that he has, by that act, so far made it up. It is compared to cases where a husband covenants to settle on the eldest son of the marriage, and lets lands descend to him in fee, which is a performance so far: and where a husband covenants, and dies intestate; which was held a leaving to his wife so much, because whether left by will, or to go by the rules of law, it was the same, and a performance, and indeed a strict performance. So where lands descended to an heir at law, who claimed, in place of his ancestor, a sum of money to be laid out in land. But I am of opinion that this differs from all the cases that have been of that kind. It has been considered whether this is to be taken as a question of

satisfaction or of performance, and possibly it may be more properly considered as a question of performance, or part performance: but in my opinion this is not strictly any of those cases. It is a question of construction of a will, and intent of the husband therein. All the above mentioned cases have been of implied satisfaction, or presumed performance, where the husband or father has done nothing; as in suffering the lands to descend, without any declaration what way he intended they should go. The Court was there to consider from circumstances, whether there was ground to imply or infer a part performance, the person having said nothing: but here is a will made, and therefore the question is upon the construction of that will, and the intent to be put upon that construction; and he could not intend to give these lands thereby as a satisfaction for what she was in strictness of law entitled to, under the articles; but clearly as an accumulated bounty, over and above. It is the same as if he had repeated every *iota* in these articles, and said, I also give her such lands. An inquiry must therefore be directed of the deficiency of the jointure; and whatever it is, must be made good, out of the estate of John Sheppard."

Broughton v.
Errington,
7 Bro. Parl.
Ca. 461.

12. Sir B. Broughton, by articles previous to and in consideration of his marriage with Miss Hill, covenanted that in consideration of the said marriage, and of 10,000*l.*, her marriage portion, he would convey certain lands in the county of Chester to trustees, to the use of himself for life, and to secure an annuity of 1,000*l.* to Miss Hill for her jointure, and in bar of dower; remainder to his first and other sons in tail; remainder to his own right heirs. The marriage took effect, and Sir B. Broughton received the 10,000*l.* portion: but no settlement was ever executed pursuant to the articles. Sir B. Broughton having sold a large estate in Lincolnshire for 27,000*l.* and having contracted for the purchase of several considerable estates in Hampshire, by his will gave to Lady Broughton a leasehold house in London, in which he resided, with all the furniture thereof; and also devised to her and her heirs all the estates in Hampshire for the purchase of which he had contracted, or in lieu thereof the whole money arising from the sale of his estates in Lincolnshire. He then devised his estates in Cheshire, which were liable to the jointure, to trustees, to the intent that C. Shrimpton should receive thereout an annuity of 20*l.*, and subject thereto, to the

use of Sir Thomas Broughton, his heir at law, for life, remainder to his first and other sons in tail male, remainder over.

Upon the death of Sir B. Broughton, Lady Broughton entered on the estate thus devised to her; and the heir at law having refused to pay her jointure, she filed a bill, praying a specific execution of her marriage articles, so far as related to her jointure; to which the heir at law put in his answer insisting that what was given by the will to Lady Broughton, was in satisfaction for what she was entitled to under the articles; and that she could not have both provisions.

The cause was heard before Lord Bathurst, who decreed that Lady Broughton was entitled to have her jointure agreeable to the articles.

From this decree an appeal was brought in the House of Lords by Sir Thomas Broughton; and on behalf of the appellant it was argued, that though a devise, when considered by itself, may carry with it the presumption of an intended bounty, yet when a testator has covenanted by articles to make a provision for his wife and children, such a presumption is liable to be controlled by a still stronger presumption, that he intended the devise as a satisfaction for the performance of those articles; and especially where the devise was so great in value, as to include both a satisfaction and a bounty. This general presumption, that where two provisions were made for a wife or a child, the testator intended the one to be a satisfaction for the other (which general presumption was grounded on the known custom of the realm, to give the bulk of the family estate to the eldest son or heir at law, with competent provisions for the wife and younger children), was peculiarly strong in this case, where, from the heavy charges already laid on the family estate, the only brother and heir would be unable to maintain the ancient credit and figure of the family. That the lands alone devised by the will were of much greater value than the rent-charge claimed under the articles; and thereby all objections were obviated which might have arisen from the provision under the will not being of the same nature with that under the articles. That from the testator's having omitted any mention of the articles, although they must have been present to his memory, while he was securing another rent-charge to C. Shrimpton, and from the manner in which he devised those estates to the appellant,

subject to the rent-charge, a strong presumption arose, that he considered the devise and bequests to his widow, as an ample satisfaction for the articles. Lastly, that the devise of the estate to Sir Thomas for life, was inconsistent with the claim of the rent-charge under the articles; inasmuch as Sir Thomas, from the nature of his interest, was incapable of making any legal conveyance of the rent-charge so claimed.

On the other side it was contended, that every devise or bequest in a will, *prima facie* imports a bounty; and, therefore, in order to induce a court of equity to consider the bequests in this will in favour of the lady, as a satisfaction for her jointure of 1,000*l.* *per annum*, or as a performance of the marriage articles entered into by Sir Bryan, it was incumbent on the appellants to shew that it was the testator's intention, when he made his will, to give her a satisfaction by that will for or in lieu of her jointure; or to perform the marriage articles on his part. And such intention must appear, either from the express words of the will, or the clear and manifest intention of the testator, appearing upon the face of it; or be drawn by necessary implication therefrom: but no such intention appeared in any part of Sir Bryan's will; rather the contrary. In order to make a devise or bequest a satisfaction for a collateral demand, or performance of a prior contract, it must be *ejusdem generis*, and not land for money, or money for land; or must at least be of such certain and known value and estimation, and so far of the same nature with the thing to be satisfied therewith, as to appear indisputably to be equivalent or superior, not only in gross value, but in annual income, to the debt or demand, or thing to be performed: but none of these circumstances attended the devises or bequests which in the present case were contended to be a satisfaction for the respondent's jointure, or a performance of Sir Bryan's marriage articles. That the annuity of 1,000*l.* intended to be settled on her by those articles, was intended to be a jointure for her, and declared to be in bar or satisfaction of dower, and therefore ought, in a Court of Equity, as well as law, to be considered as coming in the place of dower, and having the same privileges, force, and effect, as a right of dower, and neither courts of law or equity admitted an averment of a collateral satisfaction for dower. That Sir Bryan not having obtained any conveyance of the Hampshire estates, or paid the pur-

chase money for them at the time of making his will, could not devise to the respondent the legal interest therein ; and therefore the devise to her was in fact a devise of the right to complete the purchase, and a gift of mere personal estate, or so much money as he had agreed to give for the purchase of the Hampshire estate, and appeared to be so considered by him from the penning of his will : but a bequest of personal estate could not be averred to be, or considered as a satisfaction for a jointure in lands, or a rent charge upon a real estate. That in order to make Sir Bryan's will a performance of his marriage articles, it must appear upon the face of it, and at all events, a complete and full performance thereof, and to have been so intended by him : but the very reverse appeared ; for the devise of the Cheshire estate in his will must have been considered by him as subject to the articles, or springing out of the ultimate remainder in fee reserved to him by those articles. And if he had had any son by his lady, such son, as well as the mother, would have been entitled to call for a specific performance of the articles ; and the will could not be set up as a satisfaction thereof against the son, nor could such son have insisted that the devises and bequests in the will to his mother were a performance of the articles, so far as related to her ; nor if a conveyance and settlement of the estate had been actually made and executed, pursuant to the articles, could any person entitled under that settlement have set up such devises and bequests to the respondent, in Sir Bryan's will, as a discharge or satisfaction of her incumbrance or rent charge upon his estate. That if Sir Bryan had intended to devise his Cheshire estate to his brother, and the other devisees in remainder, discharged from his lady's jointure, he would most probably have expressly declared such intention by his will ; as it appeared from many circumstances, that at the time of making his will he had not forgot, but well remembered, that he had before settled such a jointure on her ; and his bequeathing her his house in Brook-street, and his plate, furniture, horses, and carriages, proved his intention that she should, after his death, live in a manner, and at an expence, suitable to her rank as his widow ; and, therefore, he must have intended, by the devise in question, to increase her jointure, in order to answer that purpose. The decree was affirmed. (d)

(d) [Upon the subject of performance and satisfaction of the husband's covenant to settle lands in jointure, see a more detailed discussion in Roper's Husband and Wife. Vol. I. p. 509. Jacob's edit.]

Unless so expressed when the widow has an election.

13. But where a freehold estate was devised to a woman expressly for her jointure, and in bar and satisfaction of a jointure settled on her, either before or after marriage; in such case the widow could not have both, for that would contradict the will; but she must make her election.

Grandison v. Pitt, 2 Ab. Eq. 392.

14. Robert Pitt, by articles in consideration of marriage, agreed to lay out 10,000*l.* in the purchase of land, to be settled to the use of the plaintiff Harriet, his intended wife, for her life, for her jointure. The marriage took place; afterwards, the father of R. Pitt gave him an estate for life, with power to grant a rent charge of 400*l.* a year to any woman he should marry, for her jointure. In pursuance of this power, Robert Pitt granted a rent charge of 400*l.* a year to his wife, to commence after his decease, in satisfaction of part of her jointure. Three days after, he conveyed a leasehold estate of 200*l.* a year in trust for his wife; and by his will he confirmed the grant of the rent charge, and the conveyance of the leasehold settled on his wife, by way of addition or augmentation, and in full compensation of her jointure.

It was held, that this was a satisfaction of the jointure provided by the articles, according to the intention of Robert Pitt; that the plaintiff should make her election, whether to have the rent charge of 400*l.* and the leasehold, or the 10,000*l.* laid out in lands.

A devise sometimes held a satisfaction.

15. Although a devise be not expressly mentioned to be in bar of a jointure, yet if it should appear, from any circumstances in the will, to have been the intention of the testator that such devise was meant as a satisfaction for the jointure: a Court of Equity would, I presume, reason by analogy from the cases in which a devise has been held a satisfaction for dower, and compel the jointress to make her election.

Tit. 6. c. 4. s. 28.

16. There is one case where there was a deficiency in a jointure, and the husband having devised lands to the jointress for her life, and also a sum of money, such devise and bequest were held to be a satisfaction for the deficiency of the jointure.

Montague v. Maxwell, 4 Bro. Parl. Ca. 598. 2 Ab. Eq. 421.

17. Lord Montague, on the marriage of his son Francis, settled estates to the use of the lady for her life, for her jointure; the lands so settled were covenanted to be of the yearly value of 1,000*l.* After the death of Lord Montague, the honour and estate descended to Francis, who devised other lands of about 500*l.* a year to his wife for her life, together with a legacy of

500*l.*, and part of his household goods ; afterwards Francis Lord M. being minded to make some further provision for his lady, revoked the uses of some part of his estates, and limited the same to trustees, in trust, to raise 10,000*l.* for her. By a codicil he devised to her an annuity of 500*l.* a year during her life.— Upon his death his widow brought her bill in Chancery, to have a deficiency in her jointure made up. Lord Cowper declared that the legacies, which were admitted to be of greater value than the deficiency in the jointure, ought to be taken in satisfaction of the breach of covenant.

18. It is observable that this case was prior to that of Prime *Ante*, s. 11. v. Stebbing, and is not reconcileable to it. The decree appears to have been made upon the ground that Francis Lord M. was a very weak man, and under the influence of his wife. For upon an appeal to the House of Lords, it was ordered that the Court of Chancery should direct an issue to try whether Lord M. was sane at the time of the execution of the codicil ; and a verdict was found that he was not of sound mind then. (e)

(e) [Upon the subject of satisfaction of debts by testamentary benefits, see the Editor's edition of Roper's *Legacies*, 1828, Vol. II. ch. 17. ss. 1, 2.]

TITLE VIII.

ESTATE FOR YEARS.

CHAP. I.

Origin and Nature of Estates for Years.

CHAP. II.

Incidents to Estates for Years.

CHAP. I.

*Origin and Nature of Estates for Years.*SECT. 1. *Estates less than Freehold.*2. *Origin of Estates for Years.*3. *Description of.*9. *Introduction of long Terms.*10. *Tenant for Years has no Seisin.*12. *But must make an Entry.*15. *An Entry before the Lease begins is a Disseisin.*SECT. 18. *Estates for Years may commence in futuro.*19. *And be assigned before Entry.*22. *May determine by Proviso.*23. *Are Chattels Real.*24. *And vest in Executors.*34. *A Freehold cannot be derived from a Term.*

SECTION I.

Estates less
than freehold.

HAVING treated of the different freehold estates, we now come to consider of those estates or interests in land that are less than freehold; of which there are four sorts:—1. Estates for years. 2. Estates at will. 3. Tenancies from year to year. 4. Estates at sufferance.

Origin of
estates for
years.
Dissert. c. 3.
ss. 52, 53.

2. It has been stated that, after the Conquest, the demesnes of the lords of manors were generally cultivated by their vills, to whom small portions of lands were allotted for their support and maintenance, to be held at the mere will of the

lord. But as to those persons whose condition was free, it became customary to grant them lands for a certain number of years, to be held in consideration of a return of corn, hay, or other portion of their crops; by which they acquired a certain interest in their lands, though much inferior to an estate of freehold. Thus Bracton says,—*Poterit enim quis terram alicui concedere ad terminum annorum, et ille eandem infra terminum illum alteri dare.* And a tenant for years was called *Firmarius*. 27. a.

3. This estate is thus described by Littleton,—“Tenant for term of years is, where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee, and the lessee entereth by force of the lease, then is he tenant for years.” And if an agreement be made for the possession of lands for half a year, or a quarter, or any less time, the lessee is considered as tenant for years, and is so stiled in all legal proceedings; a year being the shortest period of which the law will in this case take notice. Description of s. 58. Id. s. 67.

4. Where an estate is limited to a person for twenty-one years, if J. S. shall so long live, it is an estate for years only; not an estate for the life of J. S., because there is a fixed period, beyond which it cannot last. 1 Inst. 45. b.

5. Where a person devises lands to his executors for payment of his debts, or until his debts are paid; the executors only take an estate for so many years as are necessary to raise the sum required. It is the same where an estate is devised till such time as a particular sum shall be raised out of the rents and profits thereof. 1 Inst. 42. a. 8 Rep. 96. a. Corbet's case, 4 Rep. 81. b. 1 P. Wms. 609. 518. 2 Vern. 403. 5 East, 162.

6. Lord Coke says, an estate for years is frequently called a term, *terminus*, which signifies not only the period of time for which it is to continue, but also the estate and interest that passes for that period. And every estate or term for years must have a certain beginning, and a certain end, which must be ascertained at the time when the estate is created, either by the express limitation of the parties, or by a reference to some collateral act, which may, with equal certainty, measure its continuance. 1 Inst. 45. b. Tit. 32. c. 5.

7. There is a tenure between the lessor and his lessee for years, to which fealty is incident; and also a privity of estate between them. Lit. s. 132.

Gilb. Ten. 34.

1 Inst. 46. a.

Tit. 36.c. 11.

Introduction of
long terms.
1 Inst. 45. b.

2 Comm. 142.

Ante, s. 8.

Tenant for
years has no
seisin.
Lit. s. 59.
1 Inst. 200. b.

Tit. 1.

8. Notwithstanding the permanent interest of tenants for years, yet their possession was esteemed of so little consequence that they were rather considered as the bailiffs or servants of the lord, than as having any estate in the land. Their interests might be defeated by a recovery in a real action; because the recoveror was supposed to come in by a title paramount, therefore not bound by the contracts of the prior possessor. This was altered by the statute of Gloucester, 6 Edw. 1. and the statute 21 Hen. 8. by which tenants for years are enabled to falsify recoveries had by collusion.

9. While estates for years might be defeated by a recovery, it is no wonder that they were usually very short; and Lord Coke, upon the authority of the Mirror, says, that by the ancient law no lease was allowed for more than forty years; because a longer possession, especially when given without livery, declaring the nature and duration of the estate created, might tend to defeat the inheritance. But Sir W. Blackstone observes, that this law, if it ever existed, was soon antiquated; for, in Madox's collection of ancient charters, there are some leases for years of an early date, which considerably exceed that period. That terms for three hundred and a thousand years were certainly in use in the time of Edw. 3. and probably in that of Edw. 1. And it appears certain that after the statutes by which terms for years were protected from the operation of feigned recoveries, long terms were frequently created for the purpose of defrauding the lord's right of wardship, relief, and other feudal incidents. And in modern times they have been still more extensively introduced in mortgages and family settlements.

10. A tenant for years is not said to be seised of the lands, the possession not being given to him by the ceremony of livery of seisin. Nor does the mere delivery of a lease for years vest any estate in the lessee, but only gives him a right of entry on the land; when he has actually entered, the estate becomes vested in him, and he is then possessed, not properly of the land, but of the term for years; the seisin of the freehold still remaining in the lessor. And it has been stated that the possession of a lessee for years is considered as the possession of a person entitled to the freehold.

11. The distinction between the possession of a tenant for years, and the seisin of the freehold, was fully established in Bracton's time, who says that if a person first creates a term of years, and afterwards enfeoffs another of the same tenement, with livery of seisin, both estates shall stand. *Quia bene sese compatiuntur de eodem re duæ possessiones, dum tamen ex diversis causis, sicut traditio ad firmam, et traditio in feodo.* Lib. 2. c. 18. s. 7.

12. No estate for years can be created by a lease, or other common law conveyance, without an actual entry made by the person to whom the land is granted; for, although the grantor has done every thing necessary on his part to complete the contract, so that he can never afterwards avoid it; yet till there is a transmutation of the possession, by the actual entry of the grantee, it wants the chief mark and indication of his consent, without which it might be unwarrantable to adjudge him in actual possession to all intents and purposes; and for this reason the law does not cast the immediate and actual possession on him till he enters; neither has the grantor a reversion to grant till such entry. But must make an entry. 1 Inst. 46. b. 51. b. 270. a. Bac. Ab. Leases, M.

13. Upon the execution of a lease, the lessee acquires an interest, called an *interesse termini*, which he may at any time reduce into possession by an actual entry. This may be made not only by the lessee himself; but, in case of his death, by his executors or administrators. 1 Inst. 46. b.

14. It should, however, be observed that, in consequence of the operation of the Statute of Uses, an estate for years may now be created without an entry. Tit. 11. c. 4.

[As where a freehold estate is conveyed to A. and his heirs, to the use of B. for ninety-nine years, with remainder to the grantor in fee: in this case A. has only a momentary seisin to serve the use which is executed in B., and to which the statute instantly annexes the possession and legal estate, without B.'s actual entry.]

15. If the lessee enters before the time when the estate for years is to commence, it is a disseisin; and no continuance of possession, after the commencement of the term, will purge it, or alter the estate of the lessee. But such entry of the lessee, before the commencement of the term, will not divest or turn such term to a right; so that the lessee of the term may assign it over. An entry before the lease begins is a disseisin.

Hemmings v.
Brabazon,
1 Lev. 45.

Bridg. Rep. 1.

16. A made a lease to B. on the 23d of September, to hold to him for twenty-one years from Michaelmas following. The lessee entered before Michaelmas, and continued in possession for some years; then the lessor re-entered; the lessee being out of possession, assigned over the term to the plaintiff's lessor, who brought an ejectment. Judgment was given for the plaintiff; and the Court held, that the term not being to begin till Michaelmas, this was till then a future interest; that the lessee's entry before was a disseisin, not a possession by virtue of the lease.

Waller v.
Campian,
Cro. Eliz. 906.
9 Vin. Ab. 992.

17. Where the commencement of an estate for years is limited from a time past, and the lessee was in possession prior to that period, it shall be intended that he entered and occupied before, by agreement; therefore it is not a disseisin.

Estates for
years may
commence in
futuro.

Tit. I. s. 32.

18. An estate for years may be created to commence *in futuro*, though an estate of freehold cannot; for where an estate for years is created to commence *in futuro*, the freehold is not thereby put in abeyance, but still continues in the lessor, so that he is capable of answering the *præcipes* of strangers which may be brought against him. And before the abolition of military tenures, he was liable to perform the services that were due for the feud.

And be assign-
ed before entry.

19. Where an estate for years is granted to commence *in futuro*, it cannot of course be executed by an immediate entry, as that would be a disseisin; it is, therefore, only an *interesse termini*: but still the lessee may assign it over; and even if a stranger enters by wrong, yet such grant will transfer the lessee's power of entry, and right of reducing the estate into possession. For till the entry of the lessee the estate is not executed, but remains in the same plight as it was when the lease was made; so that no intermediate act, either of the lessor, or of a stranger, can divest or disturb it: because whoever comes to the possession, whether by right or by wrong, takes it subject to such future charge, which the lessee may execute whenever he thinks fit, as by a title prior and paramount to all such intermediate violations of the possession.

Bac. Ab.
Leases M.

Wheeler v.
Thoroughgood,
Cro. Eliz. 127.
1 Leon. 118.

20. A person made a lease for years, to commence at a future period; after the expiration of that time, but before any entry by the lessee, the lessor being still in possession, the lessee granted

over his term and interest. Resolved, that the grant was good; because the *interesse termini* of the lessee was not divested or turned to a right, but continued in him in the same manner as when it was first granted; and was so transferred over to another, who by his entry might reduce it into possession whenever he pleased.

Saffin's case,
Tit. 35. c. 10.
s. 45.
Co. Lit. 46. b.

21. If, however, a person entitled to an estate for years, to commence *in futuro*, once enters, and is put out of possession, he cannot afterwards grant over his term to a stranger: for by his entry the estate for years was actually executed; and, being after that defeated by the entry of a stranger, the lessee has only a right of entry left in him; which the policy of the law will not suffer him to transfer over to a stranger, no more than a right of action; lest such transfer should encourage maintenance.

Cro. Eliz. 15.
5 Rep. 124. a.

22. Though an estate of freehold cannot be made to cease by the direction of the parties, but must, except in the case of uses, be taken from the person in whom it is vested, by means somewhat similar to those by which it was given to him; yet it is otherwise in the case of an estate for years: as that may be made to cease by a proviso in the conveyance itself, upon the performance of any particular act. The practice in conveyancing has therefore long been, where terms for years are created, to insert a proviso, that when the trusts of the term are satisfied, the term itself shall cease and determine.

May determine
by proviso.

1 Inst. 214. b.

23. Estates for years are considered in law as chattels real, being an interest in real property, of which they have one quality, immobility, which denominates them real: but want the other, namely, a sufficient legal indeterminate duration; the utmost period for which they can last being fixed and determined.

Are chattels
real.
1 Inst. 118. b.
2 Comm. 385.

Tit. 1. s. 11.

Catalla dicuntur omnia bona mobilia, et immobilia, quæ nec feuda sunt nec libera tenementa.

Spelm. Gloss.
vocs catalla.

24. In consequence of this principle, estates for years do not descend to the heir of the person who dies possessed of them: but vest in his executors or administrators, like any other chattel. And although lands are now frequently demised for five hundred or a thousand years, yet the succession continues the same.

And vest in
executors.

¹ Inst. 9. a.
90. a.

25. If a lease for years be made to a bishop, parson, or other sole corporation, and his successors, yet it will go to the executors of the lessee; because a term for years being a chattel, the law allows none but the personal representatives to succeed thereto; nor can this mode of succession to a chattel be altered or controlled by any limitation of the party. The King, however, by his prerogative, may transmit a chattel to his successors.

² Comm. 506.
11 Vin. Ab.
107.

26. Estates for years pass from executor to executor *in infinitum*: but whenever the course of representation from executor to executor is interrupted by one administration, it then becomes necessary for the ordinary to commit administration afresh of the goods of the person who was last possessed of the term, in his own right, not administered by the former executor. A limited or special administration only may also be granted, namely, of certain specific effects; and it is a common practice to obtain a special administration of a term for years.

Dyer 23. b.
1 Ab. Eq. 319.
1 Atk. 460.

27. Where there are several executors, who all prove the will, they have a joint and several interest in all the goods and chattels of the testator; therefore a disposition by one of them only of a term for years is good. But one administrator cannot convey an interest so as to bind the other.

Cases and Opinions, Vol. I.
399.

28. Where a person appoints two or more executors, if only one of them proves the will, he alone will become entitled to any terms for years whereof the testator died possessed, and may assign them accordingly.

Wentw. Ex. 34.

29. An executor may assign a term for years before he has proved the will: but the will must be afterwards proved in the Ecclesiastical Court having jurisdiction over the place where the lands lie, otherwise it will have no effect as to the term.

Idem 226.

30. Where a term for years is specifically devised, the assent of the executor is necessary. But if the legatee disposes of the term at any future period, the assent of the executor will be presumed.

Ewer v. Corbett,
2 P. Wms. 146.

31. A purchaser of a term for years from an executor is not bound to see to the application of the purchase money; even though the term be charged with the payment of a particular debt, or specifically bequeathed; because terms for years are subject to the payment of all debts, in the first instance.

1 Inst. 351. a.

32. By the statute of Frauds, 29 Cha. 2. c. 3. s. 25. a hus-

band may administer to his deceased wife; and is entitled for his own benefit to all her chattels real, whether actually vested in her, and reduced into possession, or contingent, or recoverable only by action or suit. And it is now settled that the representative of the husband is entitled as much to this species of his wife's property, as to any other; and that the right of administration follows the right of the estate, and ought in case of the husband's death, after the wife, to be granted to the next of kin of the husband. And if administration *de bonis non* of the wife is obtained by any third person, he is a trustee for the representatives of the husband.

Squib v. Wyn,
1 P. Wms. 378.

33. The husband of a woman possessed of a chattel real is also entitled to dispose of it by assignment, but not by will. If, however, he does not execute his power, and his wife survives him, it will belong to her. But if the husband be an alien he will not acquire any right to a term of years belonging to his wife.

Anon. 9 Mod.
43.
Id. 104.
Tit. 5. c. 1. s. 27.

34. An estate of freehold cannot be derived from a term for years. Thus where a rent was granted for life, out of a long term for years, it was resolved to be a good charge as long as the term lasted : but that it was only a chattel, and not a freehold estate; for it was repugnant to have a freehold out of a term for years.

A freehold cannot be derived from a term.
Butt's case,
7 Rep. 23. a.
25. a.

35. Estates from year to year will be treated of in the next title.

CHAP. II.

Incidents to Estates for Years.

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| <p>SECT. 1. <i>Tenants for Years entitled to Estovers.</i>
 2. <i>But cannot commit Waste.</i>
 12. <i>Clause, without Impeachment of Waste.</i>
 16. <i>Accidents by Fire.</i>
 18. <i>When Entitled to Emblements.</i>
 19. <i>Estates for Years subject to Debts.</i>
 20. <i>Of Crown Debts.</i>
 23. <i>Alienable, and may be Limited for Life, with a Remainder over.</i></p> | <p>SECT. 24. <i>But not Entailed.</i>
 28. <i>Merged by an Union with the Freehold.</i>
 31. [<i>But not before entry of Termor, it being then an interesse Termini.</i>
 34. <i>By Surrender.</i>
 43. <i>Terms merge in Terms.</i>
 47. <i>Equity Relieves against Merger.</i>
 50. <i>How Forfeited.</i></p> |
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SECTION I.

Tenants for years entitled to estovers.
 1 Inst. 41. b.
 Tit. 3. c. 1. s. 16.

But cannot commit waste.

Tit. 3. c. 2.

Lit. a. 71.
 1 Inst. 57. a.

Idem 54. b.

EVERY tenant for years has incident to and inseparable from his estate, unless restrained by special agreement, the same estovers to which tenants for life are entitled.

2. But a tenant for years having an interest much inferior to an estate for life, has only a right to the temporary and annual profits of the land; and is therefore restrained, as well as tenants for life, from cutting down timber trees, or committing any other kind of waste.

3. Tenant for years is also punishable for permissive waste; and is therefore bound to keep all houses, and other buildings upon the land, in proper and tenantable repair, by preserving the roof in such a state as to prevent the rain from falling on the timbers. But if a house be ruinous at the time when the lease is made, and the lessee suffers it to fall down, he is not punishable, for in that case he is not bound to repair it; yet if he cuts

down timber on the land, and employs it in repairing the house, he may well justify.

4. Lord Coke says, if a tenant for years builds a new house, it is waste; and if he suffers it to be wasted, it is a new waste. The first of these propositions has been frequently contradicted. And Roll lays it down, that if a lessee for years builds a new house upon the land, where there was not any before, it is not waste, being for the benefit of the lessor.

1 Inst. 53. a.

22 Vin. Ab. 439.
Hob. 234.

5. The Statutes of Marlbridge and Gloucester, which have been already stated, extend to tenants for years; so that they are liable to the same actions, and the same penalties for waste committed, as tenants for life.

Tit. 3. c. 2. s. 26.

Attersol v.
Stevens,
1 Taunt. 183.

6. If a woman possessed of a term for years takes husband, who commits waste, and the wife dies, the husband shall be charged in an action of waste; because by the marriage he became entitled to the term.

1 Inst. 54. a.

7. It is enacted by the statute 11 Hen. 6. c. 5. that where a tenant for years assigns over his estate, and continues in the receipt of the profits, an action of waste shall lie against him. In a case upon this statute in 36 Eliz., it was resolved, 1. That every assignee of the first lessee, mediate or immediate, was within the act. For the statute was made to suppress fraud and deceit, therefore should be taken beneficially. 2. That the person in remainder was within the act, as well as the person in reversion; because in equal mischief.

Booth's case,
5 Rep. 77.

8. Where there is a tenant for years, remainder for life, remainder in fee, and the tenant for years commits waste; though the remainder-man for life cannot bring an action of waste, as not having the inheritance, yet he is entitled in equity to an injunction. If the waste be of a trivial nature, and *à fortiori* if it be meliorating waste, as by building on the premises, the Court will not enjoin; nor if the reversioner or remainder-man in fee be not made a party, who possibly may approve of the waste.

Mollineux v.
Powell,
3 P. Wms. 267.
Tit. 3. c. 2. s. 33.

9. The Court of Chancery will not entertain a bill against a tenant for years after he has assigned his term, with the consent of the lessor, for an account of timber cut down by him, and without praying an injunction.

10. A bill was brought for an account of timber cut down by the defendant, and of the profit of some stones carried off the premises by him also, while tenant; he having afterwards

Jesus Coll. v.
Bloom,
3 Atk. 262.

assigned his term, with the consent of the plaintiffs, his lessors, to a third person : and consequently no prayer for an injunction to stay waste.

Lord Hardwicke.—“ The question is, whether a bill can be brought here against a tenant, after the estate is gone out of him, for an account of waste committed, where there is no prayer of an injunction. I am of opinion that such a bill is improper, nor has any authority been cited to support it. Waste is a tort, and punishable as such ; and the party has also a remedy for the trees cut down, by an action of trover. The staying waste is a specific remedy ; and while the lessee continues tenant, it is to prevent a mischief for which, when done, an adequate satisfaction by way of damages cannot in many instances be given. This is the ground of the jurisdiction of this Court in such cases ; and the Court having such ground, will, in order to prevent a double suit, and as incident to the other relief, decree an account of the timber felled, or the waste done. This is a general principle to prevent suits ; and as some decree must be made, the Court will make a complete one. But without such a foundation there is no precedent of the Court’s decreeing damages ; and I think it would be very improper to do it, as it would tend to great vexation and oppression of tenants : and I am glad no such precedent is to be found, for the cases cited do not come up to the present. In 2 P. Wms. 240. it is not clear that no injunction was prayed. If there was, then it is but a common case ; if there was not, then the plaintiff was entitled to a moiety of the timber against the defendant, and therefore proper matter of account only between them. As to 1 P. Wms. 406., the bill was against an executor for an account of assets ; and in a case of a mine, which differs from timber or other waste, it being a sort of trade, and proper for an account, not trover : and the Court has decreed accounts in cases of mines, which they would not do in any other for that very reason ; and because a better remedy can be given here than at law, by decreeing inspections under ground, &c. And here, if the plaintiffs have a right, they may have their action of trover.”

Whitfield v.
Bewit, Tit. 3.
c. 2. s. 17.

2 Inst. 302.

11. If a lessee for years commits waste and dies, no action of waste will lie against his executors or administrators. But the executors or administrators of a tenant for years are punishable for waste done while they are in possession.

12. Where the clause, without impeachment of waste, is inserted in a lease for years, it will have the same effect as where it is inserted in the conveyance of an estate for life. And the Court of Chancery will in general restrain the import of it, in the same manner. Thus a tenant for years, though without impeachment of waste, will not be allowed to dig, and carry away the soil for the purpose of making bricks.

Clause, without impeachment of waste.

Tit. 3. c. 2.

13. The Bishop of London made a long lease of some lands at Ealing, in Middlesex, without impeachment of waste; of which there were about twenty years unexpired. The lessee agreed with some brick-makers, that they might dig and carry away the soil. The bishop applied to the Court of Chancery for an injunction, which was granted.

Ep. London v. Webb,
1 P. Wms. 627.

14. The Court of Chancery will not permit a tenant for years, though without impeachment of waste, to fell timber just before the expiration of the lease.

15. A lease was made by a bishop for twenty-one years, without impeachment of waste, of lands upon which there were several timber trees. The tenant had not cut down any of them, till about half a year before the expiration of his term; but then began to fell them. Upon an application to the Court of Chancery, an injunction was granted against him. For although he might have felled trees every year, from the beginning of the term, and then they would have been growing up gradually: yet it was unreasonable that he should let them grow till near the end of his term, and then cut them all down. (a)

Abraham v. Bubb, 2 Freem. 63.

16. Tenants for years are exempted by the stat. 6 Ann. which has been already stated, from all actions for damages on account of accidental fire.

Accidents by fire.
Tit. 3. c. 2.
Com. Rep. 629.

17. In a modern case, where there was a covenant in a lease for years of a house, to rebuild, without any exception; and the house was burnt down by accident; it was held that the lessee was bound to re-build it: [so where the covenant is to repair.]

Bullock v. Dommitt,
6 Term R. 650.
Pym v. Blackburn,
3 Ves. 34.

18. Where the determination of an estate for years is certain, as where lands are let for twenty-one years, or any other number, the tenant is not entitled to emblements; because it was his own folly to sow, when he knew he could not reap. But when the determination of an estate for years depends on an un-

When entitled to emblements.

Tit. 2. c. 1.

1 Inst. 55. b.

(a) [Upon the subject of waste as between landlord and tenant, see the cases collected in Comyn's Landlord and Tenant, Book 2, ch. 1. s. 2.]

Davies v. Con-
nop, 1 Price, 53.
16 East. 71.

Oland v. Burd-
wick,
Cro. Eliz. 460.

Estates for years
subject to debts.

Tit. 14. s. 67.

Of crown debts.

Fleetwood's
case,
8 Rep. 171.

8 Rep. 171. a.

Vide 2 Roll.
Ab. 157.

Alienable.

certain event; as where a tenant for life lets the lands for years, or where a term of years is made determinable on the death of a particular person; there the tenant will be entitled to emblements, in the same manner as a tenant for life. If, however, an estate for years determines by the voluntary act of the tenant himself, as if he commits a forfeiture, he will not be entitled to emblements.

19. Estates for years being chattel interests, and vesting in executors or administrators, are subject to the payment of simple contract debts; and are also liable to be sold by execution for the payment of debts due by judgment. But if a term for years be assigned to a *bonâ fide* purchaser, without notice, before execution is actually sued out and delivered to the sheriff, it cannot afterwards be taken by a creditor.

20. Estates for years are also subject to the payment of all debts due to the crown, while such estates continue in the possession of the debtor. But it has been long settled that a *bonâ fide* assignment of a term for years, before any execution awarded by the crown, is good.

21. Sir W. Fleetwood being possessed of a house for a term of years, was appointed receiver-general of the court of wards, and entered into bonds to the crown to render a yearly account. Having become indebted by reason of his office, he afterwards sold the house. The question was, whether this house was extendible for the debt? It was resolved that the sale should bind the crown, because it was but a chattel, and there was no covin in the case. That a sale *bonâ fide* of chattels was good after judgment, but not after execution awarded. And Lord Coke said, that a receiver or other accountant shall not be in a worse case than a felon or traitor, who may, after felony or treason, and before conviction, sell *bonâ fide* for his sustenance, his chattels, be they real or personal.

22. It was resolved in an old case, where the king's debtor took a lease, to him and his wife for years, and before execution the husband died, that execution might be sued against the wife. For it was the act of the husband, who had power over the term at the time of his death. And his wife came into it without valuable consideration: and *quodammodo* continued in of the interest of her husband.

23. [A lessee may part with his whole term, unless restrained

by a particular agreement; so he may lease a part of it; in the former case it will be an assignment, in the latter an underlease. And although a lessee cannot limit his term by way of remainder in the proper sense of that word, yet by assigning it to a trustee upon trusts, or by executory bequest, interests in the nature of remainders, may be created by deed or will.]

1 Burr. 284.

By the old law, a gift of a term for years, like that of any other chattel, for an hour, was a gift of the whole estate and interest; therefore there could be no subsequent limitation of a term for years, after an estate was carved out of it. But this was soon altered; and it has been long settled that a term for years may be limited to a person for life, with a limitation over to any number of persons *in esse* for life; [and it may also be limited to a person not *in esse*, or not ascertained, provided such limitation take effect, if at all, within a life or lives in being, or twenty-one years after.]

May be limited for life, with a remainder over,
Dyer 74. 18.

Tit. 38. c. 19.

24. Terms for years cannot, however, be entailed. 1. Because they are not within the statute *De Donis*, being estates of inheritance. 2. Because if a *quasi* intail of a term for years were allowed it would be unalienable, as no fine or recovery could be had of a term; so that the disposition of a term for years to a person and the heirs of his body, is a disposition of the entire interest in the term.

But not entailed.
Dyer 7. a. 8.
Tit. 2. c. 1.
s. 24.
4 Mad. 361.
19 Ves. 73,

See Howard v.
D. of Norfolk,
2 Swanst. 454.

25. A distinction has been made by Lord Coke between a limitation of a term in gross, or subsisting term, to a man and the heirs of his body, and a similar limitation of a term *de novo*. In the first case the residue of the term will vest in the executors of the person to whom it is so limited. But in the latter case he was of opinion that the term would only continue as long as the person to whom it was limited had heirs of his body, and that upon failure of such heirs the term would cease. This distinction has been long since exploded; and it is now settled, that where a term for years is limited to a person and the heirs of his body, it will continue, though the person to whom it is so limited should die without issue.

8 Rep. 87. a.

Leventhorpe
v. Ashby,
1 Roll. Ab. 831.

Leonard
Lovie's case,
13 Rep. 78.

26. A. Pile, by indenture demised lands to a trustee, his executors, and administrators, for ninety-nine years, in trust for himself and his wife for their lives, and the life of the survivor; and after the death of the survivor, in trust for the heirs of their two bodies; and in default of such issue, then in trust for the heirs

Hayter v. Rod,
1 P. Wms. 360.

of the survivor. They had issue one son. The husband died; afterwards the son died, an infant; the mother administered to her husband and son, and assigned the term to the defendant Rod. The question was, who was entitled to the trust of this term? whether it belonged to the plaintiff, who was the heir at law of A. Pile, or to the defendant Rod, as assignee of the wife? It was decreed that it belonged to Rod, and had not ceased.

27. [Although chattels real and other personal estate cannot be entailed, for the reasons above stated, yet through the medium of trusts, and by executory devise, they may be limited, so as in a great measure to answer the purposes of entail; and indeed are susceptible of modification, so as to be confined in a particular course of devolution, and, except for the purposes of accumulation, rendered unalienable for any number of lives in being, and twenty-one years after, with a further period allowed for gestation; at the end of which period the personalty will vest absolutely in the person taking under the limitation trust or executory bequest. (a)]

Merged by an union with the freehold. Dyer 112. 49.

28. Where a term for years becomes vested in the person who is seized of the freehold, by which there is an union of the two interests in one person at the same time, [and there is no intervening estate between the term and the freehold,] the term merges in the freehold, and becomes extinct.

Chamberlain v. Ewer, Bulst. 12.

29. Tenant *pour autre vie* made a lease for yeaes, and died, living the *cestui que vie*; it was agreed that by this the lessee for years, having the possession, became occupant; and the accession of the freehold merged in his estate for years. But if in that case the lessee for years had made a lease at will, and then the tenant *pour autre vie* had died, the tenant at will would have been the occupant; consequently the term for years, being in another person, would not be merged; there being no union of the term and the freehold in one person.

Salmon v. Swann, Cro. Ja. 619.

30. A. seized in fee, demised to B. for one hundred years, to begin at a future time; and before that time [granted the reversion in fee to C., who demised the land to D.,] for twenty-one years, to begin presently. B., before the commencement of his

(a) [For instances of bequests of personalty, which in devises of real estates would give express or implied estates tail, see Vol. II. *Rop. Legacies*, ch. 22. sect. 1 & 2. Edition 1828, by the Editor of the present work.]

term, assigned it to A., who afterwards granted a rent-charge, for which the grantee distrained D. The question was, whether the future term [of one hundred years] was drowned in the inheritance, or if it had any existence in A., so that he might thereout grant the rent; for then it would [have preference over] the second lease, being prior to it, and by consequence be liable to the payment of the rent-charge. It was resolved that the first term was [drowned in the inheritance.] 3 Prest. Conv. 122.

31. [The language of the report in the above case is applicable to merger; but it must be understood as referring only to *extinguishment*: because the term of 100 years in B. was only an *interesse termini*; and though, as such, it might by release to the reversioner be *extinguished*, still, not being an actual *estate*, could not properly be said to *merge*. From this case, it appears, that an actual term intervening between an *interesse termini* and the reversion, will not prevent the extinguishment by release of the *interesse termini*, although had the latter been an actual estate, it would have been prevented by the intervening term. Neither will the *interesse termini* intervening between a prior term and the reversion, prevent the merger of the term in the reversion, when they unite in the same person in the same right. 5 Bar. & Cress. 122.

Interesse termini will not merge.

32. Thus in the case of *Doe v. Walker*, A. granted a lease to B. for 21 years, which would expire at Michaelmas, 1809; in December, 1799, A. granted a further lease to B. of the same premises, for 60 years, to commence from Michaelmas, 1809; A. died in December, 1800, and devised the reversion to B. for life. In 1806, B. conveyed his life estate to C. It was decided by Bayley, J. that the *interesse termini* of the lease of 1799, which was to commence in 1809, was not merged in B.'s life estate. 5 Bar. & Cress. 111.

33. It would seem from the preceding case, that an *interesse termini*, to commence *in futuro*, and which consequently does not give an immediate right to the possession, is not discharged or extinguished, by the mere accession of the freehold, devised to the person entitled to the *interesse termini*, so long as it gives only a future right of possession.

34. Merger of estates for years may take place in consequence of a surrender of them to the person in remainder, or reversion; but a term cannot be merged by surrender, till the tenant has 1 Inst. 338. a. 4 Bac. Ab. 216.

By surrender.

entered ; for before entry, it is an *interesse termini* only, and there is no reversion in which it can merge. If, however, the lessee for years enters, and after assigns his estate to another, the assignee may merge the term by surrender, before entry ; because by the entry of the lessee, the possession was severed and divided from the reversion.

Tit. 32. c. 7.

The authority of *Salmon v. Swann*, before cited, is an authority that an *interesse termini* may be released.

1 Inst. 332. b.

35. Lord Coke lays it down as a general rule, that a man cannot have a term for years in his own right, and a freehold in *autre droit*, to consist together. As if a man, lessee for years, takes a feme lessor to wife, the term is merged. But this proposition has been denied, for in *Linsden v. Winsmore*, 21 Jac. 1. it was held that if a person was lessee for years, the reversion for life to A. a feme coverte, and the lessee granted his estate to the husband ; and after the feme died, the term was not extinct, because the husband had the estates in several rights, for the freehold was in the wife, and the husband only seised in her right.]

11 Vin. Ab. 441.
1 Roll. Ab. 934.
and see *Platt v. Sleep*, Cro. Jac. 275. *Thorn v. Newman*, 3 Swan. 603, Appendix. Vid. Tit. 39. *Merger*, *infra*, Vol. VI.

1 Inst. 338. b.

36. Lord Coke lays it down, that a man may have a freehold in his own right, and a term in *autre droit*. Therefore, if a man lessor takes the feme lessee to wife, the term is not drowned : but he is possessed of it in her right, during the coverture. The reason of this doctrine is thus given by Gilbert :—" The term being existing in the feme till the intermarriage, is not thereby so drawn out of her, or annexed to the freehold, as to merge therein ; because that attraction, which is only by act of law, consequent upon the marriage, would, by merging the term, do wrong to a feme covert ; and so take the term out of her, though her husband did no express act to that purpose ; which the law will not allow."

Bac. Ab. Tit. Lease R.

37. [It is correctly stated by Mr. Preston, in his valuable Treatise on Merger, that the true distinction established by the cases is not generally that there will not be any merger, because the two estates are held in different rights, or because the freehold is held by the owner of the term in his own right, and the term in *autre droit*. The leading distinctions stated by him on the law of merger, as connected with the subject of the present title, are in a great measure comprehended in the propositions contained in the five following sections :

38. When estates meet in the same person, either by act of law, or by act of the party, and he holds both in his own right, merger takes place; as where the reversion in fee descends upon, or is purchased by, the lessee—for *nemo potest esse dominus et tenens*.

Lee's case.
3 Leon. 110.
Chamberlain v.
Ewer,
2 Bulst. 12.
Doe v. Walker,
5 Barn. & C. 3.

39. When estates, held in different rights, meet in the same person, by act of the party, merger will take place; as where the husband, holding the term in right of his wife, purchases the reversion; or where an executor has a term in right of his testator, and purchases the reversion; but in the latter case the term, though merged, continues assets.

Moo. 171.
4 Leon. 38.
1 Roll. Abr. 934.
pl. 9.
Bro. Abr. Tit.
Executor,
pl. 174.
Extinguish-
ment, pl. 57.
1 L. Raym. 520.
2 Roll. R. 472.

40. When estates, held in different rights, meet in the same person, by operation of law, merger does not take place: as in the case of marriage, where a woman, being a termor, marries the reversioner, the term does not merge, because it devolves upon the husband by act of law. Again, in the instance of descent, where the husband termor marries, and afterwards the reversion descends upon his wife. So with respect to curtesy, when lessee for 60 years marries the reversioner, who afterwards dies before the expiration of the term, the term will continue, during the wife's life, while the husband is seised in her right; and it should seem also, after her death, while he is tenant by the curtesy; although a doubt has been intimated as to the latter point. Again, in the case of executor or administrator, where lessor has the freehold in his own right, and the term devolves upon him as executor or administrator of the lessee.

1 Inst. 338. b.
Bac. Abr.
Title Lease R.
Platt v. Sleep,
Cro. Jac. 275.

1 Bulst. 118.
Godb. 2. and see
Platt v. Sleep,
ubi supra.
Bac. Abr.
Lease, R.
1 Inst. 338, a.

41. It should seem, however, that the proposition contained in section 39, must be taken with the following qualification:—That when several estates meet, in the same person, and are held in different rights, merger will not take place, unless the power of alienation of the person, in whom they meet, extends to both estates.

Lichden v.
Windsore,
2 Roll. Rep. 472.

42. The application of this last doctrine between husband and wife, when the husband is seised of an estate of freehold in right of his wife, is obvious. Upon this subject, the author before-mentioned, makes the following observation:—"That the estate of freehold of the wife cannot merge, is a consequence flowing from an absence of a right in the husband to alien that estate. It is a general rule, that the husband cannot, in virtue of his marital right, dispose of his wife's freehold, so as to preclude her

Stephens v.
Britridge,
1 Lev. 36.

from resuming her estate on his death. It would be absurd, then, in the law to suffer the husband to defeat the wife of her estate by indirect means, when it denies to him the privilege of doing it by alienation in express terms."

Prest. Conv.
3 vol. 293. 297.

*Terms merge in
terms.*

Ib. 182. 207.
Tit. 32. c. 7.

6 *Mad.* 66.

43. It was for some time doubtful, whether one estate for years would merge in another estate in reversion of the same denomination. The cases are ably discussed in Mr. Preston's work, wherein he considers the proposition established in the affirmative. The point is now settled by the recent case of *Stephens v. Bridges*.

44. In that case one mortgage term of 1000 years was created in 1720, and another for 500 years in the same premises in 1725. The term of 1000 years vested in A. subject to the debt charged thereon, and upon her death devolved upon her executors, who, in 1780, took an assignment of the 500 years' term, with the debt due thereon. In 1785, the executors assigned both terms to trustees, on the marriage of the legatee, entitled to them under A.'s will. Sir John Leach, V. C. held that the 1000 years term merged in the reversionary term for 500 years.

45. It may be here remarked, that the less estate must always merge in the greater, that is, greater in quality; and, with reference to the subject of the present title, it must be remembered, that the term is not, for the purposes of merger, considered greater, according to the extent of its possible duration or numerical quantity, but from its being the term in reversion: this is proved by the preceding case.]

Vide infra.
Tit. 39. s. 94.

46. The statute of uses expressly saves the rights of the feoffees to uses; which preserves from merger any terms for years that may be vested in persons to whom the lands are conveyed to uses.

*Equity relieves
against merger.*

47. A court of equity will in some cases relieve against the merger of a term, and make it answer the purposes for which it was created.

Powell v.
Morgan,
2 *Vern.* 90.

mas v.
Kemeys,
Tit. 1. s. 47.

48. A portion was directed to be raised out of a term for years, for a daughter. The fee afterwards descended on the daughter, who, being under age, devised the portion. The Court relieved against the merger of the term, and decreed the portion to go according to the will of the daughter. (b)

(b) [Upon the subject of this and the ten preceding sections, see *Tit.* 39, the chapter on Merger, by the Editor.]

49. A person having a term of one thousand years, assigned it to the owner of the inheritance, in trust for his wife and children; the assignee accepted the trust, and declared the purposes of it. The Court of Chancery supported the trust, notwithstanding the merger of the term; and decreed the heir of the lessor to make a further assurance of the residue of the term to a purchaser.

Saunders v. Bournford, Finch. 424.
3 Swan. 603.
608.

50. If, however, a tenant for years attempts to create a greater interest than he lawfully can, whereby the estate in remainder or reversion is divested, it will operate as a forfeiture of his estate. And Lord Coke says, if tenant for life or years, the remainder or reversion in the king, make a feoffment in fee, this is a forfeiture, and yet no reversion or remainder is divested out of the king. For the reason of the forfeiture is, in respect to the solemnity of the feoffment with livery, tending to the king's disherison.

How forfeited.

1 Inst. 251. b.
Dyer 362. b.
Cro. Eliz. 323.

51. But where a tenant for years makes a lease for a longer term than he has, it is no disseisin, nor forfeiture; because it is only a contract between him and his lessee, which does not operate on the interests of the lessor.

1 Salk. 187.

52. If a husband possessed of a term for years, in right of his wife, forfeits it, this shall bind the wife, because he might have disposed of it at his pleasure.

1 Roll. Ab. 851.

53. An estate for years is not forfeited, if the person in remainder or reversion is a party to the conveyance: for in that case each person transfers only what he may lawfully alien.

6 Rep. 15. a.

54. With respect to forfeitures by matter of record, it may be laid down as a general rule, that every act by matter of record, which operates as a forfeiture of an estate for life, will also operate as a forfeiture of an estate for years.

Tit. 3. c. 1. s. 37.

TITLE IX.
ESTATE AT WILL, AND AT SUFFERANCE.

CHAP. I.

Estate at Will.

CHAP. II.

Estate at Sufferance.

CHAP. I.

Estate at Will.

SECT. 1. *Description of.*

3. *May arise by Implication.*

4. *[Or by Deed.]*

6. *Is at the will of both Parties.*

7. *Not grantable over.*

9. *This Tenant sometimes entitled to Emblements.*

11. *Cannot commit Waste.*

12. *What determines this Estate.*

SECT. 15. *Six months' notice to quit necessary.*

16. *Tenancies from year to year.*

23. *Bind the Persons in Reversion.*

24. *And devolve to Executors.*

26. *Six months' notice to quit necessary.*

SECTION I.

Description of. "TENANT at will, (says Littleton, s. 68.) is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain or sure estate; for the lessor may put him out at what time it pleaseth him."

s. 82.

2. Littleton also says that if a man lets lands to another, to have and to hold to him and to his heirs, at the will of the lessor; the words to the heirs of the lessee are void; for if the lessee dies, and the heir enters, the lessor shall have an action of trespass against him.

3. An estate at will may arise by implication, as well as by express words. Thus if a tenant for years holds over his term, and continues to pay his rent as before, such payment and acceptance of rent creates an estate at will. So where a person makes a feoffment, and delivers the deed to the feoffee, without giving him livery of seisin, and the feoffee enters, he becomes tenant at will. And in a modern case it was held that where a person entered, and enjoyed lands under a lease that was void, paying rent, he was tenant at will.

May arise by implication.
10 Vin. Ab. 400.

Lit. s. 70.

Denn v. Fearnside, 1 Wils. R. 176.

[So also it seems to be the better opinion that a person entering under an agreement for a lease must be considered a tenant at will, but the point is not free from doubt.

Hegan v. Johnson, 2 Taunt. 148, *Dunk v. Hunter*, 5 Barn. & Ald. 322. *Doe v. Lawder*, 1 Stark. 308. *Right v. Beard*, 13 East, 210. *Doe v. Jackson*, 1 Bar. & Cress. 448. *Doe v. Sayer*, 3 Camp. 8.

And upon similar principles a person entering under a contract for the purchase of an estate with the consent of the vendor, must be deemed a tenant at will.

In both the preceding cases the possession of the tenant must be referred either to a legal or adverse title; but as the entry is with the consent of the person entitled to the possession, it cannot be considered adverse; and as the agreement confers no legal title, the only alternative seems to be, that the person in possession, must by construction of law, be considered tenant at will.

4. Where an estate is in mortgage, and the mortgage deed contains the usual clause, that the mortgagor shall hold until default in payment of principal or interest, the mortgagor, while he continues in the actual possession under this agreement, would, it seems, be considered tenant for years, or from year to year. After default, if the mortgagor continues in actual possession, and there is no new agreement between the parties, he is, until payment of interest or other recognition of the tenancy, tenant by sufferance.

Or by deed.

Powseley v. Blackman, Cro. Jac. 669. See sect. 16. *Partridge v. Bere*, 5 B. & Al. 605, n.(a). *Hall v. Surtees*, 1b. 687. *Doe v. Maisey*, 8 B. & C. 767. *Doe v. Giles*, 5 Bing. 431. Ch. 2. ss. 1, 2. *Keach v. Hall*, Dougl. 22. Lit. s. 132, 460. 1 Inst. 270. b.

If the mortgage deed does not contain any clause that the mortgagor shall hold until default, and the mortgagor continues in actual possession, he is tenant at will.]

5. As the tenant at will acquires the possession by the consent of the owner, there is a privity of estate between them; but no fealty is due.

6. Lord Coke says, every lease at will must in law be at the will of both parties; therefore where a lease is made, to have and to hold at the will of the lessor, the law implies it to be at

Is at the will of both parties.
1 Inst. 55. a.

the will of the lessee also. So it is when the lease is made to have and to hold at the will of the lessee, this must also be at the will of the lessor.

Not grantable
over.
1 Inst. 57. a.

7. A tenant at will has no certain and indefeasible estate, nothing that can be granted by him to a third person; because the lessor may determine his will, and put him out, whenever he pleases. Therefore if a tenant at will assigns over his estate to another, who enters on the land, he is a disseisor, and the landlord may have an action of trespass against him.

Blunden v.
Baugh,
Cro. Car. 302.

8. A lessee at will made a lease for years, and the lessor entered. Resolved on solemn argument, 1. That this was only a disseisin at election, and not *prima facie*. 2. That admitting it to be a disseisin, the lessee at will, not the lessee for years, was the disseisor, and had gained the freehold.

This tenant
sometimes
entitled to
emblements.
Lit. s. 68.
5 Rep. 116.
Oland's case,
Idem.

9. Where an estate at will is determined by the lessor, the tenant is entitled to the corn sown, and other emblements. Otherwise where the estate is determined by the lessee.

10. If a person makes a lease at will, and is afterwards outlawed, by which the will is determined, the king shall have the profits; yet the lessee at will shall have the corn that was sown. But if a lessee at will be outlawed, the king shall have the emblements.

Cannot commit
waste.
1 Inst. 57. a.

11. Tenants at will have no power of committing any kind of voluntary waste; for if a tenant of this kind cuts down timber trees, or pulls down houses, the lessor may bring an action of trespass against him. But such tenants not being within the statute of Gloucester, no action of waste (*a*) lies against them. And as to permissive waste, there is no remedy against them, for they are not bound to repair or sustain houses, like tenants for years.

Tit. 3. c. 2.

Lit. s. 71.
Lady Shrews-
bury's case,
5 Rep. 13. b.

What deter-
mines this
estate.
1 Inst. 55 b.

12. With respect to the acts which amount to a determination of an estate at will, on either side, the first and most obvious mode of determining it by the lessor, is an express declar-

(a) [The writ of waste among many others, is abolished after the 1st day of June 1835, by stat. 3 & 4 Will. 4. c. 27. ss. 36. 37. except in cases provided for by s. 38, that is, when on the above day any person, whose right of action shall be taken away by descent cast, discontinuance or warranty, might maintain such writ, &c. then such writ, &c. may be brought after the above day, but only within the period during which an entry might have been made under the act, if such right of entry had not been taken away.]

This exception should be added to the notes on pages 26, 38, 52, 120, 135, 141, *supra*.]

ation that the lessee shall hold no longer ; which must either be made on the land, or else notice of it given to the lessee.

13. Any act of ownership, exercised by the landlord, which is inconsistent with the nature of this estate, will also operate as a determination of it. Thus if he enters on the land, and cuts down trees demised, or makes a feoffment, or a lease for years to commence immediately, the estate at will is thereby determined. On the other side, any act of desertion, or which is inconsistent with this estate, done by the tenant, will also operate as a determination of the estate. Thus if the tenant assigns over the land to another, or commits an act of waste, his estate is thereby determined. But a verbal declaration by the lessee that he will not hold the lands any longer, does not determine the estate, unless he also waives the possession. (*b*)

Idem.

1 Inst. 55 b.
57 a.

14. Neither party can determine an estate at will at a time which would be prejudicial to the other. Therefore if the lessee determines his will before the day on which the rent becomes due, he must notwithstanding pay it up to that time. And if the lessor determines his will before the rent is due, he loses it. But if either party die before the rent is due, this act of God shall not be productive of any injury ; for the lease, if it be a house, shall continue till the next rent day ; and if it be of lands, commencing at Michaelmas, it shall continue till the Summer profits are received by the representatives of the tenant.

1 Inst. 55 b.
n. 16.
Leighton v.
Thud, 1 Id.
Raym. 707.

15. It has been settled by several modern cases that six months' notice to quit must be given by a landlord to his tenant at will, or to his personal representatives, before the end of which time an ejectment will not lie.

Six months' notice to quit necessary.

16. The courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be estates at will : but have rather held them to be tenancies from year to year, as long as both parties please ; especially where an annual rent is reserved. And in a modern case Mr. Justice Wilmot said that, " In the country leases at will, in the strict legal notion of an estate at will, being found extremely inconvenient, exist only notionally, and were

Tenancies from year to year.

3 Burr.R.1609.

(*b*) [In *Doe v. Price*, 9 Bing. 356, the Court of C. B. decided that a letter to the following effect from the owner to the tenant at will, or from the agent of one to the agent of the other, is a sufficient determination of the will. " Unless you pay what you owe me I shall take immediate measures to recover possession of the property."]

1 Inst. 55 a.
n. 3.

succeeded by another species of contract which was less in convenient." Mr. Hargrave has remarked on this passage, that it means, not that estates at will may not arise now, as well as formerly, but only that it is no longer usual to create such estates by express words, and that the judges incline strongly against implying them.

Ante, s. 5.
Lit. s. 460.

17. A tenant from year to year having acquired the possession by the consent of the owner, as well as tenant at will, there is a privity of estate between them.

18. A general parole demise at an annual rent, where the bulk of the farm was inclosed, and a small part in open common fields, was held to be a tenancy from year to year.

Roe v. Rees,
2 Blackst.
1171.

19. An ejectment was brought to recover the possession of a farm of about sixty acres of land, of which fifty-one were enclosed, and the rest lay in open fields. The taking was from Old Lady-day, 1767, without any fixed term, at 40*l.* a-year rent, payable at Michaelmas and Ladyday. It was proved that a custom prevailed, where a tenant took a farm in that township, of which part consisted of open common field, for an uncertain term, that it should be considered as a holding from three years to three years.

Lord Chief Justice De Grey said, that all leases for uncertain terms were, *primâ facie*, leases at will: that the reservation of an annual rent turned them into leases from year to year. It was possible that circumstances might make it a lease for a longer term, as when the crop did not come to perfection in less than two years. And he would not say that the nature of the ground or the course of husbandry, might not deserve to be considered, when such a custom came nakedly before the Court. As a custom, the claim could not be supported; therefore it was a lease from year to year.

Doe v. Weller,
7 Term R. 478.

20. Where a tenant for life granted a lease for years, which was void against the remainder-man, and the latter before he elected to avoid it, received rent from the tenant; it was held to be a tenancy from year to year.

Doe v. Bell,
5 Term R. 471.
Tit. 32. c. 3.

21. Where an agreement for a longer term than three years is made by parol, which is void, as to the duration of the term, by the Statute of Frauds; there is a tenancy from year to year: regulated in every other respect by the agreement.

22. In a subsequent case, it appeared in evidence that the defendant had held the premises for two or three years, under a parole demise for twenty-one years: this being void by the Statute of Frauds, it was contended at the trial that the holding should have been stated according to the legal operation of it, as a tenancy at will. Mr. Justice Rooke considering it as a tenancy from year to year, over-ruled the objection. Upon a motion to set aside the verdict, on the ground of a misdirection, Lord Kenyon said the direction was right; for such a holding now operated as a tenancy from year to year. The meaning of the Statute of Frauds was, that such an agreement should not operate as a term. But what was then considered as a tenancy at will, had since been properly construed to enure as a tenancy from year to year.

Clayton v.
Blakey,
8 Term R. 3.

23. Where a tenancy from year to year has once commenced, it continues against any person to whom the lessor afterwards grants the reversion. And Mr. Justice Buller has said — “It would be unjust to a tenant to say he should be turned out by the assignee of a reversion, or by any person claiming under his lessor, when he could not be turned out by the lessor himself. On the other hand, it is no injustice, it is no hardship on the assignee, to say, he must comply with the same rules and conditions, as the person, of whom he bought, has subjected himself to.” And in a subsequent case it was held, that a tenancy from year to year would continue against an infant.

Bind the persons in reversion,
Birch v.
Wright,
1 Term R. 378.

24. Tenancies from year to year do not determine by the death of the tenant, but devolve to his executors or administrators.

And devolve to executors.

25. A person having an estate from year to year died intestate; the question was, what interest vested in his administrator.

Doe v. Porter,
3 Term R. 13.
15 Ves. 241.

Lord Kenyon said — Whatever chattel the intestate had must vest in the administrator, as his personal representative. Then it was supposed that some inconveniences might result from such a determination, but he saw none; and many inconveniences might attend a different decision. The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. In order to obviate them, the Courts very early raised an implied contract for a year; and added, that the tenant could not be removed at the end of the year, without receiving six months' previous notice. All the inconveniences

Rex v. Stone,
6 Term R. 295.

which arose between the original parties themselves, and against whom the wisdom of the law had endeavoured to provide, by raising the implied contract, existed equally in the case of their personal representatives.

Six months'
notice to quit
necessary.

26. It appears from the preceding case, and many others, that a tenant from year to year is entitled to six months' notice to quit, ending at the expiration of the year ; and that he must also give the landlord the same notice.

Lit. s. 460.
and Com.

27. [A tenant at will is capable of taking a release of the inheritance after he has entered upon the premises, for he has then an estate ; but it is otherwise with a tenant at sufferance, who has a possession but no privity. The estate of a tenant at will cannot be the foundation of a remainder.]

8 Co. Rep. 75.
a.

CHAPTER II.

*Estate at Sufferance.*SECT. 1. *Description of.*

5. *This Tenant to pay double Value after Notice.*
 6. *Who may give Notice.*
 7. *At what Time.*

SECT. 9. *Acceptance of single Rent no Bar to Recovery.*

11. *Tenants giving Notice to quit, and holding over, to pay double Rent.*

SECTION I.

“TENANT at sufferance, (says Lord Coke) is he that at first came in by lawful demise, and after his estate ended continueth in possession; and wrongfully holdeth over.” Thus, where a tenant *pour auter vie*, continues in possession after the death of *cestui que vie*, or a tenant for years holds over his term, they become tenants at sufferance. So where a person makes a lease at will, and dies, the estate is thereby determined; and if the lessee continues in possession, he is tenant at sufferance.

Description of.
 1 Inst. 57. b.

2. Where a man comes to a particular estate by the act of the party; there, if he holds over, he is tenant at sufferance. But where he comes to the particular estate, by act in law, as if a guardian, after the full age of the heir, continues in possession, he is not a tenant at sufferance, but an abator.

1 Inst. 57. b.
 2—134.

Vid. sup. p. 243.
 s. 4.

3. No person can be a tenant at sufferance against the king, for no laches can be imputed to his majesty in not entering; therefore, if the king's tenant holds over, he will be considered as an intruder.

1 Inst. 57. b.
 2 Leon. 143.

4. There is no privity of estate between a tenant at sufferance, and the owner of the land; for this tenant only holds by the laches of the owner, [so that there cannot be a release from the

latter to the former, which will operate by enlargement of his estate.]

This tenant to pay double value after notice.

5. Tenants at sufferance were not liable to pay any rent, because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding estate. But now, by the statute 4 Geo. 2. c. 28. s. 1. it is enacted, that where any tenant holds over, after demand made, and notice in writing given for delivering the possession; such persons so holding over shall pay double the yearly value of the lands so detained, for so long time as the same are detained; to be recovered by action of debt; against the recovering of which penalty there shall be no relief in equity.

Who may give notice.
Wilkinson v. Colley, 5 Burr. 2694.

6. The landlord, by himself, or by his agent lawfully authorized, is the proper person to give notice. But it was held, in a modern case, that a receiver, appointed by the Court of Chancery, is an agent for the landlord, authorized by this act to give a tenant notice to quit the premises; and that a notice in writing to quit is of itself a sufficient demand.

At what time.

7. A notice to quit under this statute may be given previous to the expiration of the lease under which the tenant holds the lands.

Cutting v. Derby, 2 Black. R. 1075.

8. Lands were leased from the 10th October, 1763, for eleven years. The person entitled to the reversion gave a written notice to the tenant on the 30th September, 1773, and again repeated the like notice on the 7th October, 1774, or to pay double value. On the 10th October, the reversioner went on the premises, and demanded possession, which was refused.

In an action for double value, the jury gave a verdict for the plaintiff. A motion was made for a new trial, Because, 1. By the statute 4 Geo. 2. notice to quit must be given after, and not before, the expiration of the term. 2. The lease did not expire till midnight, and possession was demanded in the preceding afternoon.

Lord Chief Justice De Grey was of opinion, that the notice to quit might be previous to the expiration of the term. It prevented surprise, and was most for the benefit of both landlord and tenant. Mr. Justice Blackstone said, that a notice or requisition to the tenant to quit at the end of his term, implied that it must be previous. It would be absurd, because impossible to be complied with, to require *after* the expiration of the term

that the tenant should quit *at* the expiration.—The motion was refused.

9. Although a landlord, after bringing an ejectment, and after the time laid in the demise, should agree to accept the single, instead of the double rent, to which by the statute he is entitled; yet he will not be thereby precluded from recovering in the ejectment.

Acceptance of single rent no bar to recovery.

10. It was held, in a modern case, that where a demise is for a certain time, no notice to quit is necessary at or before the end of the term, to put an end to the tenancy. That a demand of possession, and notice in writing, &c. are necessary to entitle the landlord to double rent or value. That such demand may be made for that purpose six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value, as from the time of such demand, if the tenant holds over.

Cobb v. Stokes, 8 East. 358.

11. By the stat. 11 Geo. 2. c. 19. s. 18. reciting that great inconvenience had happened to landlords, whose tenants had power to determine their leases, by their giving notice to quit, and yet refusing to deliver up the possession, when the landlord hath agreed with another tenant for the same; it is enacted—“That in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her, or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained; that then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid.”

Tenants giving notice to quit and holding over, to pay double rent.

12. It was resolved in a modern case, that this act is not confined to those tenants who have a clause in their leases enabling them to quit at the end of seven, eleven, or fourteen years, upon giving notice; but also to parol leases for a year. And that a parol notice was sufficient, because the statute did not require a written one.

Timmins v. Rowlinson, 1 Black. R. 533. 3 Burr. 1603.

13. [By the stat. 1 Geo. 4. c. 87. various provisions are made for enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants.

5 Bar. & Ald.
766.

Ib. 770.

14. In Doe v. Roe it was decided, that a tenancy by virtue of an agreement in writing, for three months certain, is a tenancy "for a term," within the meaning of the above acts. But where a tenant holds from year to year, but without a lease or agreement in writing, it is not a case within the first section of the act.

TITLE X.
COPYHOLD.

CHAP. I.

Nature of Copyholds.

CHAP. II.

Copyhold Grants.

CHAP. III.

Incidents to Copyholds.

CHAP. IV.

Fines and Heriots.

CHAP. V.

Forfeiture of Copyholds.

CHAP. VI.

Extinguishment and Suspension of Copyholds.

CHAP. I.

Nature of Copyholds.

SECT. 2. *Description of.*

- 6. *Free Copyholds, [or customary Freeholds.*
- 9. *When the Freehold in the Lord.*
- 14. *When the Freehold in the Tenant.]*
- 17. *Circumstances necessary to their Existence.*
- 18. *A Manor.*
- 19. *A Court.*
- 20. *The things granted must be Parcel of the Manor.*

SECT. 31. *And demised or demisable by Copy.*

- 36. *[Wastes when Grantable.]*
- 38. *What will destroy the Custom of Granting.*
- 43. *What may be Granted by Copy.*
- 49. *Copyhold Customs.*
- 51. *How proved.*
- 54. *Copyhold Jurisdictions.*
- 60. *Rights of the Lord.*

SECTION I.

WE now come to treat of those estates which are derived from immemorial custom and usage, and called copyholds. But having already discussed the origin and nature of copyhold tenures, Dis. c. 3.

it will here only be necessary to consider the properties of, and incidents to, the estates thus held.

2. “Tenant by copy of court roll (says Littleton, s. 73.) is, as
Description of. if a man be seised of a manor, within which manor there is a custom, which hath been made time out of mind of man, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee simple, or fee tail, or for term of life, &c. at the will of the lord, according to the custom of the same manor.”

Cro. Jac. 559.
Carth. 428.

3. A copyhold estate may therefore be described to be a parcel of the demesnes of a manor, held at the will of the lord, according to the custom of the manor, by a grant from the lord, and an admittance of the tenant, entered on the rolls of the Manor Court.

Lit. s. 77.
4 Rep. 21. b.

4. The title of copyholders to their estates was originally deemed so precarious, that it was held in the reign of Edward IV. that if the lord ousted his copyholder, he had no other remedy but to sue him by petition. It was, however, laid down by Danby, Chief Justice of the C. B. in 7 Edw. 4. and by his successor, that a copyholder, observing the customs of the manor, and performing his services, should, if put out by the lord, have an action of trespass against him. A doctrine which has long been fully established; for, as Lord Coke says, “albeit he is tenant *ad voluntatem domini*; yet it is *secundum consuetudinem manerii*.”

1 Inst. 60. b.
9 Rep. 76. b.

5. Copyhold estates are, however, still said to be held at the will of the lord; and this position is so far true, that the freehold of all lands held by this tenure is vested in the lord. The copyholder's estate is not so great as even an estate for years. The will of the lord is not however arbitrary, as it formerly was, but must be conformable to the customs of the manor.

Free copyholds,
or customary
freeholds.
Diss. c. 3.
Stephenson v.
Hill, 3 Burr.
1273.
Roe v. Conolly,
5 East. 51.

6. It has been already stated that there is a species of copyhold which is held according to the custom of the manor, not at the will of the lord; called a free copyhold, or customary freehold. And it was formerly held that the freehold of these estates was in the tenant, from which they acquired the appellation of customary freeholds; but it is now fully settled that the freehold is in the lord.

7. At the great election for Oxfordshire, in the year 1754, a question arose whether free copyholders, holding according to

the custom of the manor, and not at the will of the lord, were entitled to vote. Sir William Blackstone wrote a tract on this subject, intituled *Considerations on Copyholders*, in which he contends that copyholders of this kind were not, by the old law, entitled to vote for knights of the shire; because they were in fact villein sockmen, whose services were base and servile, though reduced to a certainty; and therefore their estates were not comprised under the denomination of free lands or tenements, or freehold, within the meaning of the statute of 8 Hen. 6. c. 7.; and this opinion is established as law by the statute 31 Geo. 2. c. 14. which enacts, that no person who holds his estate by copy of court roll, shall be entitled to vote at the election of a knight of the shire.

8. In *Doe v. Danvers*, the estate was held of the manor of 7 East. 299. Stepney, Middlesex; it was demisable only by the licence of the lord, passing by surrender and admittance, to which the tenant was admitted by the description of a customary tenant, *habendum* to the grantee and his heirs, *tenendum* of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of court, customs, and other services; the Court of King's Bench held the freehold was in the lord.

9. [There is another description of customary freeholds to be distinguished from those alluded to by the author in the three preceding sections, and to which his observation (section 6), that the freehold is in the lord, must not be applied.

When the freehold is in the lord.

The local peculiarities of customary freeholds are almost as various as the manors of which they are holden; but independently of these minor distinctions, customary freeholds may be divided into two large classes, namely, those of which the freehold is in the *lord*, and to which the author above alludes, and which might perhaps for distinction be more properly called *free copyholds*; and those of which the freehold is in the *tenant*, and therefore strictly *customary freeholds*: the former pass by *surrender* and *admittance*, the latter require a *conveyance* from the grantor to the grantee, besides the admittance, or as the custom is in some manors, surrender and admittance. The freehold in the tenant passes by the conveyance from the grantor to the grantee, the admittance or surrender and admittance being necessary only to mark the change of tenancy.

The former of these two classes are the subject of discussion

Law Tracts,
Vol. 1. No. 2.

in Blackstone's Considerations on Copyholds, and which he considers to be the same as tenements held by villain socage, as distinguished from those in pure villainage or common copyholds. They have a freehold *interest* for life, in tail, or in fee, but not a freehold *tenure*; and the leading distinction between them, and pure copyholds seems to be, that the latter are held at the will of the lord, the former only according to the custom.

10. The above distinction, which seems not to have been sufficiently noticed will, it is conceived, tend in a great measure to remove the apparent confusion and contradiction in cases and text books upon this subject. In some of the cases the custom of the manors of which the lands in question were held are not stated, and the observations of the Court and counsel *arguendo*, have been considered general propositions, respecting all customary freeholds, where they were only directed to the case before them, and *e converso*. Some modern authors have come to the conclusion, that the freehold of all these customary estates is in the lord, whether they pass by surrender and admittance, or by deed and admittance. And Lord Ellenborough, in *Doe v. Huntington*, noticed in section 14, has been considered to intimate the same opinion. But it is conceived such a conclusion is inconsistent with the authority of Lord Coke, and also of Sir William Blackstone, who expressly says, that in some instances the freehold is not in the lord, but in the tenant.

Co. Lit. 59. b.
Co. Cop. 32.

2 Bla.Com.149.
marg.
Com. on Cop.
147. Ed. 1762.
Law Tracts,
Vol. 1. 2. dis.

11. In most of the cases in which it was decided that the freehold was in the *lord*, and not in the tenant, it will be found that the lands passed by *surrender and admittance*; while on the other hand, where it is held, that the freehold was in the *tenant*, the lands passed by *conveyance* from him and *admittance*, or, as it is in some manors, by *conveyance, surrender, and admittance*.

Carthew. 432.

12. Of the former class were the lands, in the case of *Gatt v. Noble*, where it was decided that lands of the manor of Corsham, Wilts, which passed by surrender and admittance, and which were holden according to the custom, but *not at the will of the lord*, were customary freeholds, and not copyholds.

2 Vent. 143.
cited in Crowther
v. Oldfield, 2 Ld.
Raym. 1226.

In *Rogers v. Bradley*, the customary lands appear to have passed by surrender and admittance: but that case turned upon a point of pleading, and nothing is said in reference to the freehold being in the lord or otherwise.

In *Stephenson v. Hill*, the lands were held according to the custom of the manor of Morland, in Westmorland. Lord Mansfield held, the freehold was clearly in the lord. The custom is not stated in the case, whether these lands passed by surrender and admittance, or by conveyance; and the observations of the counsel, *arguendo*, seem to refer generally to customary freeholds in the north. 3 Burr. 1278.

In *Burrell v. Dodd*, the lands were held of the manor of Henshaw, in Northumberland. No mention is made of the custom, as to transfer, whether by surrender or conveyance; the point decided was, that as the lands were not *strictly freehold*, they were not within the statutes of partition. 3 Bos. & Pull. 378.

So in *Roe v. Vernon*, the lands were holden according to the custom of the manor of Wakefield, in Yorkshire, demisable by copy of court roll, and passed by surrender and admittance, but they were not held at the will of the lord. The point decided in this case was, that according to the true construction of the will in question, as the lands, though not strictly, were reputed copyholds, they did not pass by the devise of "freehold lands." 5 East. 51.

13. The four preceding cases are not decisive authorities either way, in support of the distinction now under consideration; but the later case, of *Doe v. Danvers*, before cited by the author, clearly establishes the point, that the freehold of customary lands, passing by surrender and admittance, is in the lord, though not held *ad voluntatem domini*. sect. 8. 270.

The last case is *Brown v. Rawlins*, which decided the same point: there the lands were held of Tynemouth, in Northumberland, and passed by surrender and admittance. 7 East. 409.

14. The cases where the lands passed by conveyance and admittance, or by conveyance, surrender, and admittance, remain to be noticed; and with the exception of the case of *Doe v. Huntington*, they establish the proposition that of such customary lands the freehold is in the tenant. When freehold in the tenant. 4 East. 271.

In that case the lands were held according to the custom of the manor of Parton, Micklewhaite, &c. Cumberland, and passed by bargain and sale, and admittance.

The observations of Lord Ellenborough apply generally to the customary estates peculiar to the north of England; he remarks, they are not strictly freeholds, and notwithstanding their ano-

Ubi supra.

malies, fall under the considerations of copyholds; and, after citing *Stephenson v. Hill*, and *Burrell v. Dodd*, he seems to consider those cases as establishing a general proposition, that the freehold of the estates to which he alluded, including those in the case before him, was in the lord; a conclusion, which, if intended by his lordship, the cases do not authorize: for the customary freehold in the principal case differed materially from those in *Stephenson v. Hill*. As the decision in the case of *Doe v. Huntington* would have been the same, whether the freehold had been in the lord or the tenant, it cannot be considered a decision in opposition to the distinction now under consideration.

See 5 East. 82.

3 Sim. 385.

Amb. 301.

3 Russ. 108.

In reference to the case of *Doe v. Huntington*, it may be further observed, that there was no custom to devise the lands by will, directly nor indirectly, through the medium of a surrender or conveyance; a circumstance from which a strong argument may be drawn, that the freehold was in the tenant, and devisable according to the statute of Frauds, as strict freeholds. Lord Hardwick, in *Hussey v. Grills*, speaking of the customary freeholds in that case, observes, that as there was no custom to surrender to the use of the will, there was no reason to hold them out of the statute: the decisions in *Hussey v. Grills*, and in *Willan v. Lancaster*, seem founded upon the principle that the freehold was in the tenant.

15. In *Willan v. Lancaster*, the lands were held of the manor of Shap, in Westmorland, and passed by bargain and sale, and admittance. They were conveyed by the tenant to a trustee, in trust for such persons as he should by will, duly executed, appoint. The tenant, by will duly executed according to the statute, devised the lands in question, and by a subsequent codicil, unattested, he made a different disposition of the Shap estate. It was contended, that in analogy to copyholds, the estates would pass by the unattested codicil; but Lord Gifford, M. R. decided otherwise.

1 Russ. & Myl.
32.

16. The late case of *Bingham v. Woodgate*, is a decision in support of the above distinction. The lands in that case were held of, and within the manor of Muncaster: a conveyance from the grantor to the grantee was in all cases necessary, as well as a surrender and admittance: the lord, being tenant for life, purchased the fee of a customary tenement, and it was held the seignory was only suspended during the lord's life, and not

extinguished, as it would have been, if copyhold. Sir John Leach, M. R. observed, “ the custom of the manor requiring a bargain and sale, as well as a surrender and admittance, to pass the customary tenements, they are plainly freehold ; and *St. Paul v. Lord Dudley and Ward*, and *Doe v. Danvers*, have, therefore, no application. The necessity of a surrender and admittance is probably a remnant of the ancient tenure of villenage, and does not affect the freehold nature of the interest, although it prevents the customary tenement from being strictly of a freehold tenure—a distinction which is well established. The question is, what is the effect of the union of the fee of the customary tenements with the estate for life of the lord ? If the lord had been seised of the fee of the manor, the union would have extinguished the customary tenements ; but extinguishment takes place only when the two estates have the same duration. The lord being tenant for life, the effect of the union was to suspend the seignory during the life of the lord ; for a man cannot, at the same time, be lord and tenant : but, at the death of the lord, the seignory was revived, and the fee of the customary tenements descended to his heir at law.”]

15 Ves. 167.

Ubi supra.

Lit. s. 559, 560, 561. and Coke's Com.

17. There are four circumstances necessary to the existence of a copyhold estate. 1. A manor. 2. A court. 3. The lands must be parcel of the manor. 4. They must have been demised, or demisable, by copy of court roll, from time immemorial.

Circumstances necessary to their existence.

18. With respect to a manor, of which the nature has been already explained, it is essentially necessary ; for a copyhold estate is parcel of the demesnes of a manor, and held of the lord of such manor. But though the demesnes of a manor be severed from the services, or the services extinct, by which the manor is in fact destroyed, yet still it will continue to be considered as a manor, so far as is necessary to support the copyholds held thereof. And it is said that a tenant in dower of a third part of a manor has a manor for the purpose of granting copyholds.

A manor. Diss. c. 3.

Idem s. 17.

Gilb. Ten. 209. Golds. 37. 155.

19. As to a court, it is equally necessary, the copyholder having no other evidence of his title than the rolls of the Court. But there are two different courts incident to a manor ; a court baron or freeholder's court, and a customary court, relating only to the copyholders, in which the lord, or his steward, is judge. And although there should be no freeholders in the manor, by which the court baron, and even the manor itself is in some respects

A court. 1 Inst. 58 a. 4 Rep. 26. b. Gilb. Ten. 210.

lost, yet there still may be a customary court : for as these two courts are distinct from each other in every respect, the want of freeholders does not preclude the lord from holding a customary court for his copyholders.

Melwich v.
Luther,
4 Rep. 26 a.
Cro. Eliz. 102.

20. It was resolved in 30 Eliz. that where the lord of a manor, having many ancient copyholders in one town, granted the inheritance of all the copyholds to another, the grantee might hold a court for the copyholders. For though it was not a manor in law, because it wanted free tenants, yet as to the copyhold tenants, the grantee had such a manor, that he might hold a court to make admittances and grants of the copyholds.

Neale v.
Jackson,
4 Rep. 26 a.
Cro. Eliz. 395.

21. This doctrine is confirmed by another case, in 37 Eliz., in which it was held, that where the lord of a manor demised all his lands, which were granted by copy for 2,000 years, the lessee might hold a court for the copyholders.

Gay v. Kay,
Cro. Eliz. 661.

22. In a case subsequent to that of Melwich v. Luther, where a woman was endowed of several copyholds, it was resolved that she might hold a court, and grant copyholds ; though the services of any of the freeholders were not allotted to her, but only the demesnes, and the copyholds.

Ten. 210.

23. Notwithstanding these authorities, Lord Chief Baron Gilbert says, there were precedents that such grantee of the inheritance of copyhold lands could not keep a court ; no more than the grantee of the inheritance of one copyhold : that as to the case of Melwich v. Luther, it was said, a writ of error was brought, and the justices and barons held the judgment erroneous.

Cro. Eliz. 103.
Bright v. Forth,
Cro. Eliz. 442.

Murrell v.
Smith,
4 Rep. 24 b.
Cro. Eliz. 252.

24. A grant of the freehold of one copyhold will not enable the grantee to hold a customary court. The copyhold will not, however, be totally destroyed by such a grant : but the copyholder will be excused from all those services that arise by reason of the customary court.

4 Rep. 30 a.
Co. Cop. s. 45.

25. To every customary court a steward is necessary, who must be appointed by the lord ; and whose duty it is to preside in the court, to determine all cases arising between the copyholders, and to take care of the court rolls. The lord of a manor may retain a person to be his steward, by word only ; except in the case of the crown.

Id. s. 46.

26. The steward of a private person may appoint a deputy under him, whose authority will be as great as that of his principal.

In the Earl of Rutland's case, who was appointed steward for life of a manor by the Crown, without any words empowering him to make a deputy, it was resolved that he might notwithstanding appoint an under-steward. For when the Crown granted him the office of steward, he being an earl, it was implied in law, for conveniency sake, that he might make a deputy. 2 Brownl. 235.

27. Every copyholder is bound to do suit and service in the lord's court; and when the copyholders are assembled there, they are sworn by the steward to do the ordinary business, and are called the homage. Co. Cop. Sup. s. 10.

28. Every copyholder has an interest in the court-rolls, as well as the lord, being the evidence of his title; nor can the lord deny him a sight or copy of a court-roll, to make such use of it as he may think proper. If he objects, the Court of King's Bench will direct it; and if the lord then refuses, an attachment will lie against him. Rex v. Shelly, 3 Term R. 141. Rex v. Lucas, 10 East, 235.

29. It was resolved in 27 Eliz., that if a court was held by a steward of a manor out of a manor, and grants and admittances were there made, it would be void; for the court of the manor ought to be held within the manor. But that by custom the court might be held out of the manor, and grants and admittances made there: as several abbots, priors, &c. used to hold courts at one manor, for divers several manors; which was held good by custom. Clifton v. Molyneux, 4 Rep. 27 a. 1 Leon. 289.

30. The third circumstance necessary to the existence of a copyhold is, that the land or other thing granted be parcel of the manor; for a copyhold is part of the demesnes of a manor. It is not, however, absolutely necessary, that the lands should continue to be parcel of the manor, as it has been shewn that where the lord of a manor granted the inheritance of all his copyholds, whereby those lands were severed from the manor, yet the copyholds still subsisted. The things granted must be parcel of the manor. 1 Inst. 58 b. Ante, s. 20.

31. The fourth circumstance necessary to the existence of a copyhold is, that the lands or other thing have been demised or demisable by copy from time immemorial; for this tenure derives its whole force from custom, so that no new copyhold can be created at this day: that is, nothing can be now granted by copy of court-roll, which was not granted, or grantable by that tenure before. And it was resolved in a modern case, that copyhold lands must be stated, or found, or pleaded, to have been And demised or demisable by copy. Roe v. Newman, 2 Wils. R. 125.

demised or demisable, by copy of court roll, for time out of mind. Otherwise a court of justice cannot adjudge them to be copyhold.

Kemp v. Carter,
1 Leon. 55.

32. Upon issue whether the lord of a manor had granted certain lands by copy of court roll, according to the custom of the manor; it was given in evidence, that within the said manor were divers customary lands; that the lord lately at his court had granted the lands in question by copy, but they had never been granted by copy before. The Court held that the jury were bound to find, *dominus non concessit*, for notwithstanding that *de facto, dominus concessit per copiam*, yet *non concessit secundum consuetudinem manerii*, &c. For the said land was not customary, nor was it demisable, as the custom had not taken hold of it.

33. Though lands should appear to have been granted by copy for sixty years back; yet if there has been an interruption in that mode of granting them, they will not be deemed copyhold.

Taverner v.
Cromwell,
3 Leon. 107.

34. The bishop of Norwich being seised of the manor of N. in right of his church, granted in 10 Hen. 8. parcel of the demesnes of the said manor to one T. and his heirs by copy. These lands had never been granted by copy before, but were held in this manner till 23 Hen. 8. when T. committed a forfeiture. The bishop seized the land: but re-granted it to him immediately by copy; by which it was again held till 8 Eliz.

The Court determined that fifty years' continuance was requisite to fasten a customary condition upon the land against the lord: and though the original commencement of the grant by copy was in 10 Hen. 8. from which to 8 Eliz. was more than sixty years, yet that the seizure for a forfeiture, which happened in 23 Hen. 8., interrupted the continuance of the time, which might by law have perfected the customary interest; so that the commencement of the copyhold was to be reckoned from 23 Hen. 8.; which not being sufficient time to make good a custom, the lord might enter on the copyholder, as upon his tenant at will.

1 Inst. 58 b.

35. Where lands, which have been immemorially granted by copy, come to the lord by forfeiture or escheat, he may again grant them out by copy; though he keep them in his hands for many years, because they were always demisable by copy. And

in 41 Eliz. it was resolved, that where a copyholder of a manor belonging to the Queen was attainted of felony, by which his copyhold escheated, the Queen's steward of the manor might grant it out again as copyhold, without any warrant.

Harris v. Jays,
4 Rep. 30 a.
Cro. Eliz. 699.
Badger v. Ford,
3 Barn. & Ald.
153.

36. It appears to have been resolved in 24 Cha. II. that a grant of part of the waste of a manor, by copy, was void; unless similar grants had been made time out of mind. But in a subsequent case it was admitted that a lord of a manor might make new grants of part of the manor, to hold by copy; and a case was cited to that purpose. Lord King, however, observed that in the case cited the grant was made with the consent of the homage. That the question in the principal case was, whether there was a custom to do it without the homage, which must go to law; and then it would be considered how far a custom to make such grants, without the homage, was good.

Wastes when
grantable,
Ep. London
v. Row,
3 Keb. 124.
Hughes v.
Games,
Ca. temp.
King. 62.

37. In a modern case it was held, that although parcels of the waste of a manor had been newly granted by copy of court roll, yet that having been granted by virtue of an immemorial custom to demise parcels of the waste as copyhold, they were to be considered as much copyholds as if they had been immemorially holden by copy of court roll. That the tenure had its foundation in custom, which had immemorially attached upon the waste, the subject of the grant. That copyholds of a similar description to those in question were very common in the north of England, and had often been recognized in judicial determinations.

Northwicke v.
Stanway, 3 Bos.
& Pul. 346.
Rex v.
Hornchurch,
2 Barn. & Ald.
189. 3 ib. 153.
2 Stark. 478.
Folkard v.
Hemmett,
5 T. R. 417.
Boulcott v.
Wiamill,
Infra, Tit. 27.

38. Where lands, formerly granted by copy are conveyed by the person entitled to the freehold and inheritance of them, for life or for years, this will destroy the custom of granting them by copy. Because, while the lands are in the possession of these grantees, they are neither demised nor demisable by copy. So, if the lord makes a feoffment in fee of such lands, upon condition, and afterwards enters for the condition broken, the lands can never after be granted by copy.

What will
destroy the
custom of
granting.

39. It has been stated that copyholds escheated, or forfeited to the lord, may be re-granted by copy. But if such lands be extended upon a statute or recognizance, acknowledged by the lord, or assigned to the lord's wife for dower; although these impediments are by act of law, yet as the custom of granting by

Ante, s. 35.
4 Rep. 31 a.

copy is interrupted by a lawful act, the lands can never after be granted by copy. But a tortious interruption of the estate, as if the lord be disseised, and the disseisor die seised ; or if the land be recovered against the lord by false verdict, or erroneous judgment, will not destroy the custom of granting by copy ; although in these cases the land was not demised or demisable during the interruption.

40. Where copyhold lands, which have fallen to the lord, are leased, together with the manor, this will not destroy the custom of granting them by copy.

Lee v. Boothby,
Cro. Car. 521.

41. Thus it was held by the Court of King's Bench, on a trial at bar in 14 Cha. I. that if a copyholder in fee surrenders to the lord of the manor his copyhold estate, and the lord makes a lease for years of the manor, together with the copyhold, by the name of his tenement called H. that it was not a determination of the copyhold : because, when the lord let the manor, it was included as parcel of the manor. For the manor being demised, included the copyhold as parcel of the manor ; and the naming of the copyhold was surplusage ; so that it remained always as parcel of the manor, and demisable by copy, as it was before.

1 Inst. 58 b.
n. 7.

Corresbie v.
Rusky,
Cro. Eliz. 459.
2 Roll. Ab. 197.
271.
5 Mau. & Selw.
155.

42. No person can destroy the custom of granting land by copy, unless he is proprietor of the fee simple of the manor.— Thus, if a person who is only tenant in tail, or for life, of a manor, makes a lease for years of an escheated copyhold ; though, as to himself, the custom of granting by copy is thereby destroyed ; yet, as to the issue in tail, or the reversioner, the custom is not destroyed. So it is in the case of a husband seised in right of his wife.

What may be
granted by
copy.
1 Inst. 58 b.

Hoe v. Taylor,
4 Rep. 30 b.

43. With respect to the things which may be granted by copy, Lord Coke says, all lands and tenements within a manor, and whatever concerns lands or tenements, may be granted by copy. In 27 Eliz. it was said by the court of C. B. that any profit of any parcel of a manor may, by custom, be granted by copy. In the same case, it was resolved, that underwood growing upon a part of the manor might be granted by copy ; because it was a thing of perpetuity, to which a custom might extend ; for after every felling, the underwood grows again.

1 Inst. 58 b.
Stammers v.
Dixon,
7 East. 200.

44. The herbage or vesture of land may be granted by copy. In a modern case, it was resolved, that a person might hold the *prima tonsura* of land by copy, while another might have the

soil, and every other beneficial enjoyment of it, as freehold; and that ancient admissions of the copyholders, and those under whom they claimed the land, by the description of *tres acras prati*, might be construed only to carry the *prima tonsura*, if in fact they had enjoyed no more under such admissions; while another had the after crop, had cut the trees and fences, scoured the ditches, and kept the drains; though the copyholder might have paid all the rates and taxes; which was in his own wrong.

45. It is said by Lord Coke that a manor may be granted by copy: and it was resolved in 1 Ja. I. that a customary manor might be held by copy. That the customary lord might hold courts, and grant copies. That such customary manor should pass by surrender and admittance. That fines should be paid upon admittance, as well upon alienation as descent. That there might be lord customary, mesne and customary tenant, as well in the case where the mesnalty was a tenancy at will, according to the custom of the manor, as where there was a tenancy at will, at the common law, of a manor.

1 Inst. 58 b.
Nevill's case,
11 Rep. 17.

46. Lord Chief Baron Gilbert says, in such case the lord may grant copies. But it must be of things which have been usually demised; and that he cannot grant all his demesnes by copy, unless they have been usually demised.

Ten. 215.

47. It was resolved in 43 Eliz. that tithes might be granted by copy of court roll, for they might be parcel of a manor.

Sands v.
Drury,
1 Roll.Ab. 498.

In Croke's report of this case, Popham is said to have been of opinion that tithes were not grantable by copy, because a manor and tithes were of several natures; so it was impossible that that which was not parcel of the manor, could be demised according to the custom of the manor. But Gawdy doubted, and conceived it had been well enough, if it had been so used time out of mind.

Cro. Eliz. 814.

1 Roll.Ab. 498.
A pl. 1.

48. Nothing however can be granted by copy, unless it lies in tenure, or is appendant to something that lies in tenure; therefore rents, commons in gross, advowsons in gross, and such like, cannot be granted by copy. But an advowson, a common, or a fair, which are appendant, may pass by copy, by reason of the principal thing to which they are appendant.

Co. Cop. s. 42.

49. As copyhold estates owe their existence to immemorial custom, so the rules by which they are governed derive their

Copyhold
customs.
1 Inst. 63. a.

effect from the same source. Hence Lord Coke observes that what a copyholder may or ought to do, or not do, the custom of the manor must direct. Many of those customs materially differ from the common law; and also from those which relate to freehold estates, in this circumstance, that freehold customs must at least be so general as to extend throughout a county, and cannot prevail in a particular place only; whereas a custom relating to copyholds may be good in a single manor.

Cro. Eliz. 253.
9 Rep. 75 b.
1 Salk. 184.
Jenk. 274.
Dean & Chap.
of Ely v. Warren
2 Atk. 189.
1 Wils. R. 63.
7 East. 121.

50. There are two sorts of copyhold customs; 1. General, extending to all manors in which there are copyholders, and warranted by the common law, of which the courts of law take notice, without being specially pleaded. 2. Particular, prevailing in some manors only, which must be specially pleaded; these are construed strictly; and where they are contrary to reason, morality, or justice, or not capable of being reduced to a certainty, the courts will not pay any attention to them. It should however be observed that the unreasonableness of a custom is not altogether to be deduced from the rules and maxims of the common law; for there is no particular custom that does not, in some respects, contradict the common law.

How proved.
4 Leon. 242.

51. Lord Coke has laid it down that there are two pillars of custom; one, common usage; the other, that it has been time out of mind; therefore the person who maintains a custom must shew precedents in the court rolls to prove the usage; for without such proof, and that it has been put in use, although deemed and reputed a true custom, a Court would not give credit to the proof by witnesses.

Doe v. Mason,
3 Wils. 63.

Roe v. Parker,
Tit. 29.

2 Atk. 189.

52. A regular series of entries in the court rolls is sufficient evidence of the customs of a manor; and an ancient writing, handed down with the court rolls from steward to steward, purporting to be a customary of the manor, is evidence of a custom.

53. Lord Hardwicke has said, it was certainly the rule of law in general that the evidence of neighbouring manors shall not be admitted to shew the custom of another manor, because every manor is to be governed by its own customs. But this rule was not so universal as not to be varied in some instances; as in mine countries, Derbyshire, &c., the courts of law had admitted evidence with regard to profits of mines, &c. out of other manors, where they were analogous and similar, to explain or corroborate the custom of the manor in question.

54. Copyholds being derived from the tenure in villenage, they were not originally within the jurisdiction of the king's courts at Westminster. If therefore a copyholder was ousted by a stranger, he could not implead him by the king's writ, but must proceed by plaint in the lord's court, and make protestation to prosecute the suit in the nature of an assise of *novel disseisin*, or of any other writ which his cause required. Free copyholders were also incapable of suing or being sued in the usual real actions; but had a peculiar method of process, called a writ of right close. (a)

Copyhold
jurisdictions.
Lit. s. 76.
Co. Cop. s. 51.

1 Watk. 35. n.

Black. Tra. 213.

55. A writ of false judgment does not lie on the decision of a customary court: but the party grieved must sue the lord by petition, in the nature of a writ of false judgment; and therein assign errors, and have remedy according to law.

1 Inst. 60. a.
Scott v. Kettle-
well,
19 Ves. 335.

56. There were however some cases in which the king's courts assumed a jurisdiction over copyholds. Thus it appears to have been settled in the reign of Edw. IV. that if a copyholder was ousted by the lord, he might maintain an action of trespass against him in the king's courts. And in the time of Queen Elizabeth it was resolved, that the lessee of a copyhold for one year should maintain an ejectment. For inasmuch as his term was warranted by the law, and the general custom of the realm, it was but reasonable that, if he was ejected, he should have an action of this kind. Since the practice of bringing ejectments for copyholds has prevailed, the jurisdiction of lords of manors has fallen into disuse; and the Court of King's Bench has, in several instances, granted a *mandamus* against a lord of a manor to admit a copyholder.

Ante, s. 4.

Melwich v.
Luther,
4 Rep. 26.

Rex v. Rennet,
2 Term R. 197.
6 East. 431.

57. The Court of Chancery has also assumed a jurisdiction over copyholds; upon the principle that equity will not suffer a right to be without a remedy. Therefore, if an erroneous judgment be given in a copyhold court, a bill may be exhibited in Chancery for its reversal.

1 P. Wms. 330.

58. The Court of Chancery will also compel the lord of a manor to admit a copyholder; and to hold a court for that purpose. It will also moderate the rigour of customs, and relieve against excessive fines, and unreasonable forfeitures; of which an account will be given hereafter.

Cro. Jac. 368.

(a) [Abolished after the 1st June 1835, by stat. 3 & 4 Will. 4. c. 27. ss. 36, 37. but see also s. 38. *supra*, p. 244, note.]

Fawcett v.
Lowther,
2 Ves. 300.

59. Where a doubt arises respecting the customs of a manor, the Court of Chancery will direct an issue to try what those customs are : but is not bound to send a custom to be tried which *primâ facie* is void at law. It will also grant a commission to examine witnesses for the purpose of ascertaining the customs of a manor, and to set out the boundaries of copyholds, where they are intermixed with freeholds.

4 Ves. jun. 180.

Rights of the
lord.

60. It has been shewn that the freehold of all lands granted by copy remains in the lord, who consequently continues to enjoy a variety of rights over those lands, and the copyholders ; the extent of which depends upon the quantity of interest granted, and the customs of the manor.

Infra, c. 3.

61. Thus where copyholds are granted for life only, the right to the timber, mines, and minerals, continues in the lord : but in the case of copyholds of inheritance, it will be shewn hereafter that the copyholder has frequently, by particular custom, a right to the timber ; and that the lord has no right, without a custom, to dig for mines.

Infra, c. 5.

62. The lord has in all cases a right to fealty and suit of court from his copyholders ; and is also entitled to all forfeitures and escheats : but he may by his licence permit a copyholder to do many acts which would otherwise operate as forfeitures ; or by a subsequent act dispense with such forfeitures.

CHAP. II.

*Copyhold Grants.*SECT. 1. *Nature of.*

- 3. *All Lords of Manors may make Grants.*
- 10. *Though under personal Disabilities.*
- 12. *Provided they have a lawful Estate.*
- 14. *A Steward may make Grants.*
- 18. *To whom Grants may be Made.*

SECT. 21. *Estates in Fee and, where the*

- Custom authorises, Estates in Tail, may be Granted.*
- 27. *And Estates for Life or Lives.*
- 28. *No General Occupancy.*
- 31. *But Special Occupancy Allowed.*
- 33. *The Custom must be Observed.*
- 43. *Copyhold Grants take place of many other Estates.*

SECTION I.

It has been shewn that copyhold estates are derived from a voluntary grant by the lord to the copyholder, according to the custom of the manor, under the usual services and returns. Grants of this kind are still made by lords of manors, of lands which have been demised or demisable by copy; whenever they fall into the possession of the lord by escheat, forfeiture, or any other determination of a former grant. Voluntary grants are now also frequently made in those manors where the custom only authorizes grants for life or lives; for whenever the estates thus granted fall in, they are usually regranted in the same manner.

Nature of.

2. Whenever copyholds are transferred from one person to another or descend to an heir, a new grant is also made by the lord; so that in fact every copyhold is held by grant from the lord. But in all those cases the grantee must be admitted in the lord's court, and the admittance, in which the new grant is contained, entered on the rolls; upon which the title of the grantee entirely depends.

3. All those who have any estate in a manor, though it be only for years, or even at will, may regrant a copyhold, which escheats, or comes to them in any other way; reserving the an-

All lords of manors may make grants.
1 Inst. 58. b.

Clarke v. Pen-
nefather,
4 Rep. 23.
11 Rep. 18. a
Cro. Jac. 99.
Co. Cop. s. 34.
Gilb. 330.

cient rents, customs, and services. And such grant shall bind the lord who has the inheritance of the manor ; for each of them is *dominus pro tempore*, and within the custom. The reason is, that a copyholder does not derive his estate out of that of the lord only ; for then the copyhold interest would cease with the estate of the lord ; but from the custom.

Ten. 205.

4. Lord Chief Baron Gilbert says, the principle upon which this doctrine is founded is, that copyholders were originally mere tenants at will ; and so, though the lord *pro tempore* had only a particular estate, yet he might grant copyholds ; as it could be no prejudice, but rather an advantage, to the succeeding lord, in respect to the rents and services reserved in such grants. Besides, the succeeding lord might turn out the copyholder. And when the law was so altered, that the copyholder acquired a permanent interest in the estate, it was still held that a lord *pro tempore* might grant copyholds in fee, though he had but a particular estate.

4 Rep. 21. b.

4 Bac. Ab. 72.
Tit. 32. c. 2.

5. If a bishop grants customary lands by copy, and dies, the copyhold is not determined. Such a grant shall also bind the crown, where the temporalities come into the king's hand. Nor are bishops and other ecclesiastical persons or corporations restrained, either by the stat. 1 or 13 Eliz., from making grants of copyhold lands in fee, in tail, for lives, or years, according to the custom of the manor. And no confirmation is necessary to establish such grants, though made by a sole corporation.

Tit. 34.

6. In the statute 1 Anne, by which the crown is restrained from alienation, there is an exception, as to grants or admissions of copyholds, parcel of any manor belonging to the crown.

Carew's case,
Moo. 147.

7. It was resolved in 26 Eliz. that a lord of a manor who was only tenant for life, or for any other particular estate, might grant copyholds in reversion, though not executed in the life of the grantor. But in another case the Court was of opinion, that to make such a grant good, there should be a custom to enable the lord to grant in reversion.

March 6.
Gilb. Ten. 204.

Gay v. Kay,
Cro. Eliz. 661.
1 Roll. Ab. 499.
Shapland v.
Radlin, 1 Roll.
Ab. 499.

8. If tenant in dower of a manor grants a copyhold in reversion, where by custom it may be granted in that way, it will bind the heir ; though the reversion be not executed in her lifetime. It is the same of a guardian in socage, [or husband seised in right of his wife, she concurring.]

Cro. Jac. 98.

1 Inst. 58. b.

9. If a lord of a manor devises that his executors shall grant

copyholds according to the custom of the manor, for payment of his debts, the executor, though he has no estate in the manor, may make grants accordingly.

10. In voluntary grants made by the lord himself, the law does not respect the quality of his person. For be he an infant, *non compos mentis*, an idiot, or lunatic, an outlaw or excommunicate, he is capable of making voluntary grants of copyholds.

Though under personal disabilities.
Co. Cop. s. 34.

11. If the lord of a manor commits felony or murder, and process of outlawry is awarded against him, and after the *exigent* he grants copyhold estates according to the custom, then is attainted, the grants are good; though by relation the manor was forfeited from the time of the *exigent* awarded. So if the lord had been attainted by verdict of confession, any grant by copy, after the felony or murder committed, would be good, notwithstanding the relation.

Idem.

Tit. 1. s. 75.

12. It should, however, be observed, that persons not having a lawful estate in a manor, cannot make copyhold grants. Thus it is settled that tenants at sufferance, disseisors, abators, or intruders, cannot bind the lawful owners of a manor by their grants of copyholds.

Provided they have a lawful estate.
1 Inst. 68. b.
4 Rep. 24. a.
1 Co. 140. b.
4 ib. 31. Co.
Cop. ss. 34, 35.
Tracts 74.

13. A. was tenant of a manor for the life of B., who died; A. continued in possession of the manor, held courts, and made voluntary grants by copy. Adjudged, that these grants did not bind the lessor; because, after the death of B., A. was only tenant at sufferance.

Rous v. Artris,
4 Rep. 24. a.
2 Leon. 45.

14. A steward of a manor may make voluntary grants, for he represents the lord to all intents. And where a copyholder of a manor belonging to the crown was attainted of felony, by which his copyhold escheated; it was held that the steward might grant it again *ex officio*, without any special warrant. For the custom of the manor enabled the steward *pro tempore* to grant it; and the crown was bound by the custom. But a steward appointed by the king's auditor to hold a court *pro hac vice*, cannot make voluntary grants of copyholds; because such an auditor has no authority to appoint stewards.

A steward may make grants.
Co. Cop. s. 45.
4 Rep. 30. a.
Gilb. Ten. 221.
—316.
Moore 112.

Harris v. Jays,
Cro. Eliz. 699.

15. A steward appointed by a private person may make voluntary grants of copyholds, notwithstanding any subsequent disability of the person who appointed him.

16. A lord of a manor granted the stewardship thereof by

Blewitt's case,
Ley. 47.

deed to W.S. for life. The lord was afterwards found a lunatic, and his estate committed to the care of certain persons. Resolved, that the committees could not grant copyholds, as they had no estate in the manor. But the lunatic, by his steward, might grant copyholds, according to the custom. It was however ordered, that the steward should grant none, without the privity of the committees.

Marke v. Sulyard, Toth.
45. ed. 1820.

17. [The lord or his steward may make a grant out of court, as well as in, or even out of the manor.]

To whom grants
may be made.
Co. Cop. s. 35.
Tit. 32. c. 2.

18. All persons who are capable of taking by grant at common law, are also capable of taking grants of copyholds, according to the custom. Thus, an infant, a person of nonsane memory, an idiot, a lunatic, an outlaw, or an excommunicated person, may be grantees of a copyhold. But a lord of a manor cannot make a copyhold grant immediately to his wife.

Firebrass v. Pennant,
2 Wilk. R. 254.

19. The Rev. W. Symes, being rector and lord of the manor of Compton Martin, in the county of Somerset, the premises in question being parcel of the said manor, held by copy of court roll, fell into the hands of the said rector by the death of the last tenant; and he demised the same to his wife, to hold to her and two other persons for their lives. It did not appear that there was any custom in this or any other manor, for a lord to grant lands by copy of court roll to his wife immediately, without the intervention of a third person.

The Court said, that as this was a provision by a husband for his wife, they would be glad, if possible, to get over that maxim of law, that a husband and wife are one person, therefore could not grant lands to one another. So, where there was no particular custom in a manor, the common law must take place. This was an original and voluntary grant by the husband to his wife, who could not by law take immediately from him, any more than a monk, who was dead in law, and considered as no person. So here was no person to take, for the wife and husband were only one person. They were dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton, as determine this grant from the husband immediately to his wife to be good, where there was not so much as the shadow of a person intervening. The Court determined, reluctantly, that the grant was void.

[20. So neither it should seem can the lord make a copyhold grant to a corporation aggregate, for they cannot do homage in person, and the lord would be prejudiced in his services: and with respect to grants in fee, as a corporation never dies, the lord would likewise lose his fines on death. The latter objection also applies to corporations sole.] (a)

Nor to a corporation.

21. Although a copyholder is admitted to hold at the will of the lord, or according to the custom of the manor, and the freehold remains in the lord; yet it is most usual to grant estates of this nature to the copyholder and his heirs, by which he acquires a customary estate in fee simple.

Estates in fee, and, where the custom authorises, estates in tail may be granted.

22. It was formerly much doubted whether the statute *De Donis* extended to copyholds, so as to convert what was formerly a conditional fee in a copyhold into an estate tail. In a case which arose in 18 Ja. 1. the question was, whether the surrender of a copyhold estate to a person and the heirs male of his body, there being no custom to warrant such an estate, gave the surrenderee an estate tail, or a conditional fee. And it was held by Croke and two other justices, against the opinion of Yelverton, that the statute *De Donis* did not extend to copyholds, consequently that the surrenderee took a conditional fee.

Co. Cop. s. 53.

Rowden v. Malster, Cro. Car. 42.

23. This resolution appears contrary to the passage already transcribed from Littleton, where he expressly says that copyholds may be granted in tail. But Lord Coke was of opinion that Littleton must be understood to speak only of such copyholds as might be entailed by the particular customs of the manors whereof they were held; in which case the statute *De Donis* co-operating with the custom, would give to such an estate all the qualities of an estate tail. And he adds, that although lands have anciently and usually been granted by copy of court roll, to many men and the heirs of their bodies, that would not prove a custom of entailing copyholds; for such grants might have created conditional fees. But if a remainder had been limited over, after such an estate, and enjoyed, or if the issue had avoided the alienation of the ancestor, or recovered the same in a writ of *formedon* in the descender, these and such like would be sufficient to prove a custom of entailing.

Ch. 1. s. 2.

1 Inst. 60. b.
3 Rep. 8. b.

(a) [Bro. Fealty, pl. 15. Co. Lit. 66. b. 2 Lord Raym. 864. also see Ranshaw v. Robottom, Duke, Ch. Uses, 135, and 1 Watk. Cop. 4th Edit. [242], note 1, and the opinions there cited.]

Adams v.
Hincloe,
11 Mod. 199.

24. In a special verdict in 7 Ann. the question was, whether a copyhold could be entailed, without laying a special custom for so doing; it was adjudged by the whole Court that it might. Lord Holt rejected the notion of Lord Coke about the statute *De Donis* co-operating with the custom: and held that that statute turned all conditional fees into estates tail. It has been the constant practice for the last century to limit copyholds to persons and the heirs of their bodies; and yet there is no case in which any doubt has arisen but that this was an estate tail within the statute *De Donis*.

25. [But recent authorities seem to have put the point at rest, and it appears to be now settled that copyholds are not within the statute *De Donis*.

5 T.R. 104. 111.

In *Roe v. Baldwere*, Lord Kenyon, C. J. said, that copyhold estates are not subject to entails, unless there be a custom in the manor to warrant it.

2 Ves. S. 601.
S. C.
Amb. 279.

In *Moore v. Moore*, Lord Hardwicke decided that a custom to entail must be proved; that it was not satisfactory to say that because a copyhold estate might be surrendered in fee *vel aliter*, it might be entailed under the statute of Westm. 2. That it was not sufficient to shew that lands had been granted to men and the heirs of their bodies; but to shew that by custom an estate tail might be created, you must shew that there have been surrenders in tail with remainders over, (for otherwise that might be a fee simple conditional,) or that the lands had been enjoyed for such a length of time, and had gone so long in a course of descent, according to the limitation, as to exclude the supposition of a fee simple conditional.

Doe v. Clark,
5 Barn. & Ald.
462.

26. It is now also settled that where there is not any custom within the manor for entailing copyholds, a gift of them in form of an entail, is a fee simple conditional, at common law, which, as stated in a former page, gives the donee as soon as he has issue, the absolute power of alienation.]

And estates for
life or lives.

27. Copyholds may also be granted for life or lives; and in many manors the custom is to grant copyholds for one, two, or three lives. In some of those manors the custom gives the copyholder a right to a renewal of the grant upon the falling of the lives, from which they are called tenant-right estates. And where copyholds are granted for lives, the person who pays the

Wharton v.
King, infra.

fine takes the beneficial interest, and the others named in the grant are only trustees for him. Tit. 12. c. 1.

28. It appears to have been resolved in 15 Jac. 1. that if a copyhold is granted to two persons for the lives of three others, and the tenants *pour autre vie* die, living the *cestuis que vie*, there shall be no occupant, but the lord of the manor shall have the estate; for no one can gain a copyhold by occupancy, but by the admission of the lord. And Lord Holt has said that an occupancy is for supplying the freehold: but the freehold of a copyhold estate is in the lord, and the tenant has only an estate at will. No general occupancy. Ven v. Howell, 1 Roll. Ab. 511. 2 Ld. Raym. 1000.

29. The statutes 29 Cha. 2. and 14 Geo. 2. which have been already stated, and by which estates *pour autre vie* are appropriated, do not extend to copyholds.

30. A tenant *pour autre vie* of a copyhold died in the lifetime of the *cestui que vie*; his administrator was admitted, and brought an ejectment for the recovery of the land. It was held that the statutes 29 Cha. 2. and 14 Geo. 2. did not affect copyholds, for they only extended to estates, by the appropriation of which no persons would be injured. Whereas, if they were construed to extend to copyholds, they would operate to the prejudice of the lord. Zouche v. Forse, 7 East. 186.

31. There may, however, be a special occupancy of a copyhold; for Lord Chief Baron Gilbert, after citing the resolution in Ven v. Howell, says;—if the limitation had been to the tenants and their heirs, during the lives of the *cestuis que vie*, the heir in such case would have the estate, not the lord; because he had excluded himself, and expressly granted the copyhold to the grantee and his heirs, during such a time. And this doctrine has been confirmed in the following case:— But special occupancy allowed. Ten. 326. Ante, s. 28.

32. Juliana Ramsey surrendered certain copyhold estates, to the use of Richard Tonson, his heirs and assigns, for her life; and he was admitted accordingly. Richard Tonson died in the lifetime of Juliana Ramsey; and the question was, whether his heir was entitled as special occupant? Doe v. Martin, 2 Black. R. 1148.

Lord Chief Justice De Grey said, that though in copyholds there could be no general occupant, since the freehold was never out of the lord, yet it did not follow there could be no special occupant, when the lord had expressly granted the estate to one

and his heirs, during the life of A. B. Indeed the term of special occupant was in such case, and in all others, a very forced and improper phrase; and he thought there was great weight in what was said by Vaughan, 201.—that the heir took it as a descendible freehold. Such, however, was the language of the law. The Court was unanimously of opinion that the heir of Richard Tonson took as a special occupant.

See also *Doe v. Goddard*,
1 Barn. & Cres.
522.

The custom
must be ob-
served.
Co. Cop. s. 41.

33. In all voluntary grants of copyholds, the custom of the manor must be strictly observed. And Lord Coke says, that though it is in the lord's power to keep the lands in his own hands, or to dispose of it at his pleasure, yet, because in disposing of it he is bound to observe the custom precisely in every point, and can neither in estate or tenure bring in any alteration, in this respect the law accounts him custom's instrument.

Ten. 198.

34. Lord Chief Baron Gilbert has observed on this passage, that the reason of it seems to be, because there is nothing but custom to warrant the grant by copy, which ought, therefore, to be strictly pursued, as to the estates, customs, services, and tenures; or else it is not the estate that was granted before. Yet if there be a copyholder in fee, it seems that the lord may release part of the services, and not do any prejudice to the copyholder's estate; for there is an estate in being, that appears to be the old estate. But when the lord grants a new estate by copy, since it is an estate against common right, and warranted only by the custom, that must be strictly pursued to bind the heir.

Ten. 199.

35. So strict is the law in this respect, says the same author, that if the rent be reserved in silver, where it anciently was in gold, or payable at two feasts, where anciently it was payable at one, or if two copyholds escheat, one usually demised for twenty shillings, and the other for ten shillings, and the lord demises both for thirty shillings, it is not good.

1 Inst. 52. b.

36. With respect to the estate which the lord may grant, it has been resolved in many cases that a custom enabling the lord to grant greater estates will also enable him to grant lesser ones.

Gravenor v. Tedd,
4 Rep. 23.

37. Thus where the custom of a manor was, that copyholds might be granted in fee simple; a grant to one and his heirs of his body was held to be good. For whether it was a fee simple conditional, or an estate tail, it was within the custom. So the lord might grant for life or for years by the same custom; for an estate in fee simple included all.

See sect. 23. 24.

38. The custom of a manor was to grant copyholds in fee or for life *solummodo ea capienti extra manus domini*. A grant was made to one for life, remainder in tail, remainder in fee. It was objected, that it ought to be an immediate taking, therefore the remainder was void ; also that the custom did not warrant any estate but for life, and in fee. The court resolved, that the grant was good enough ; and that the custom that it should be granted *solummodo ea capienti* was void.

Stanton v.
Barnes,
Cro. Eliz. 373.
1 Roll. Ab. 511.

39. If customary land has been always granted in fee, and upon an escheat the lord grants it for life, it will be good ; for the custom which enables him to grant in fee will enable him to grant for life. And after the death of the grantee for life, the lord may grant the same in fee ; for the grant for life was no interruption of the custom.

Kemp v. Carter,
1 Leon. 55.

40. If the custom of the manor be, that copyholds may be granted for three lives, an estate may be granted to three persons for the lives of two ; for this is not a greater estate than for three lives.

Ven. v. Howell,
6 Vin. Ab. 25.

41. It was found by special verdict, that the land was ancient copyhold, demisable for one or two lives ; that it was granted by copy to J. Downes, the husband of the plaintiff, *habendum* to him for life, and to the plaintiff *durante viduitate suâ*. The question was, if this were warranted by the custom, for the wife's estate ; for it was no absolute, but a limited estate. All the justices held, without any argnment, that it was good ; for when the custom warranted the greater estate for life to be made, it warranted the lesser estate ; especially here, because this was also an estate for life, but limited, and as it were conditional.

Downs v.
Hopkins,
Cro. Eliz. 323.

42. By the custom of the manor of Tregoar in Cornwall, customary lands are demisable by copy of court-roll to two or three persons, for term of their lives, and the life of the longest liver of them, *habendum successivè sicut nominantur in chartâ, &c. et non aliter* : and the person first named in the grant enjoys the tenements to him alone during his life, and so does the second and third ; and the lord is entitled to a heriot of every such person successively dying seised. The lord granted the tenements in question to one Thomas Norton and his assigns, *habendum* to him and his assigns, for the lives of J. P., W. W., and of the said T. Norton, and of the longer liver of them *successivè*. The question was, whether this grant was warranted by the custom. It

Smartle v.
Penhallow,
2 Ld. Raym.
994.
6 Mod. 63.

was contended that it was void *in toto*, not being pursuant to the custom ; for the grant was to Thomas Norton and his assigns, *habendum* for his own life, and the lives of J. P. and W. W., which varied from the custom ; and though the grant was of an inferior interest than was allowed by the custom, yet it being prejudicial to the lord, in respect of his tenure, and of his services, the custom would not warrant it. In this case T. Norton was tenant for his own life, and the lives of J. P. and W. W. ; for they were not named to take an interest, but only added by way of limitation of estate ; so that upon the death of T. Norton, if either of the two other lives were in being, there would be an occupant of the copyhold, which would be an injury to the lord, when a stranger would have power to come in without his consent. Lord Chief Justice Holt said, the custom consisted of three parts ; 1. As to the constitution of the estate granted, which must be by copy of court-roll. 2. As to the extent of the estate, which must not be above three lives. 3. As to the manner of the estate, which was different from the constitution of the law, by the operation of the custom ; *viz.* to two or three, *habendum successive sicut nominantur*. When a custom enabled the lord to grant for three lives, he could grant for one life, for it was within the custom. The cases cited in support of the grant were in point. Where the custom was to grant in fee, yet the lord might grant to one for life, with a remainder to another in tail, as in the case of *Stanton v. Barnes* ; and it was good, though the custom was to grant an entire estate in fee simple. So where the custom was to grant for life, a grant *durante viduitate* was good ; as in the case of *Downes v. Hopkins*, though it had a different determination ; because it was a lesser estate, and so within the custom. Here the grant was only to T. Norton during his own life, and the lives of the other two ; the consequence of which was, that if T. N. died living the *cestuis que vie*, since there could be no occupant of a copyhold estate, the lord upon his death would have his heriot custom, and also the land. So that it would be no inconvenience, though the lord had no heriot upon the death of the other two, because he would have the land itself.

The Court was unanimously of opinion that the grant was good.

Ante, s. 38.

Ante, s. 41.

43. As copyhold grants derive their effect from the custom of the manor, and not from the estate of the lord ; they are considered as paramount to, and will take place of many other titles and estates, prior to them in point of time.

Copyhold grants take place of many other estates.

44. A lord of a manor granted copyhold lands for three lives, and afterwards married. The lives determined during the coverture. The lord entered upon those lands, and kept them in his own hands for some time ; he then granted them out again by copy, and died. The wife of the lord claimed dower. It was resolved that the copyholder should hold the lands discharged of dower ; because he was in by the custom, which was paramount to the title of dower.

Cham v. Dover,
1 Leon. 16.
4 Rep. 24. a.
8 Rep. 63. b.

45. Lord Coke, however, says, if the heir after the death of the ancestor, and before an assignment of dower to the widow, had granted lands by copy, the widow might avoid these grants ; because instantly upon the death of the husband her title to dower was complete, and nothing more was wanting to the confirmation of her interest.

Co. Cop. s. 34.
1 Inst. 58. b.
n. 6.

46. Voluntary grants of copyholds will also take place of any prior charges or incumbrances, created by the lord who makes such grants.

47. The Earl of Westmoreland being seised in fee of the manor of Kennington, granted a rent-charge to Sir W. Cordell for life. He afterwards made a feoffment of the manor to Sir John Clifton, who made a voluntary grant of a copyhold to one Sands for life, according to the custom of the manor, the same being an ancient copyhold. The rent-charge being in arrear, a distress was made on the copyhold granted to Sands. After great difference of opinion, it seems to have been finally settled that the copyhold was not chargeable ; because the estate of the copyholder was derived from the custom, which was paramount to the charge.

Sands v. Hempton,
2 Leon. 109.

3 Leon. 59.
Dyer, 270.
2 Brown. 208.
Gilb. Ten. 202.

48. The same point is laid down by Lord Coke, who says, if the lord of a manor acknowledges a statute, and then grants lands by copy, and after the manor is delivered to the cognizee in extent, the grant by copy cannot by this be impeached.

Co. Cop. s. 34.

49. Although, by an entry for a condition broken, prior estates and incumbrances are in general defeated ; yet copyhold grants form an exception, of which an account will be given hereafter.

Tit. 13. c. 2.

CHAP. III.

Incidents to Copyholds.

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| <p>SECT. 1. <i>Copyholders subject to Fealty, &c.</i>
 3. <i>Entitled to Estovers.</i>
 7. <i>But cannot in general commit Waste.</i>
 16. <i>Copyholds are descendible.</i>
 17. <i>Alienable and devisable.</i>
 18. <i>May be leased for Years.</i>
 21. <i>Not liable to Debts.</i>
 22. <i>Subject to Free Bench.</i>
 32. <i>Which may be barred by a Jointure.</i></p> | <p>SECT. 34. <i>And by the Alienation of the Husband.</i>
 41. <i>Or even an Agreement to convey.</i>
 45. <i>And by Forfeiture.</i>
 46. <i>And by a Grant of the Freehold to the Husband.</i>
 47. <i>A Devise may bar Freebench.</i>
 49. <i>Subject to Curtesy.</i>
 54. <i>What Statutes extend to Copyholds.</i></p> |
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SECTION I.

Copyholders
subject to
fealty, &c.
Lit. s. 84. 132.
1 Inst. 63. a.

By the general custom of all manors, several services are due by copyholders to their lords, of which the first is fealty. And Lord Coke says, the doing fealty by a copyholder proves that so long as he observes the customs of the manor, and performs his services, he has a fixed estate; for tenant at will, that may be put out at pleasure, shall not do fealty. The taking the oath of fealty is, however, now usually respited.

Ante, Ch. 1.

2. Suit of court is another service to which all copyholders are bound; for otherwise, it would be impossible for the lord to hold a copyhold court. And it has been stated, that every copyholder is bound to attend the lord's court, and to be sworn of the homage. In many manors copyholders are also liable, by particular custom, to the payment of rent service, rents of assize, and reliefs; and to the performance of a variety of services.

Entitled to
estovers.
Heydon v.
Smith,
13 Rep. 68.

3. It was resolved in 8 Jac. 1. that every copyholder may, of common right, and as a thing incident to the grant, take housebote, hedgebote, and ploughbote, upon his copyhold. But this

right may be restrained by custom; namely, that the copyholder shall not take it unless by assignment of the lord, or his bailiff. The lord cannot, therefore, cut down all the timber trees on a copyhold estate, but must leave sufficient for the reparation of the houses, and for ploughbote, &c.

4. A copyholder brought an action of trespass against the lord of the manor for cutting down trees on his copyhold, alleging a custom within the manor that every copyholder for life, &c. had used to have all timber trees growing upon his land for the reparation of houses: and that all the timber trees growing upon the said lands were not sufficient for the reparations, &c. The whole Court were clearly of opinion that judgment ought to be given for the copyholder, because it appeared he had not enough to repair without those trees: therefore, judgment could not be given for the defendant without overthrowing the case of Heydon v. Smith. And Lord Chief Justice Holt said, that a copyholder holds the trees by copy of court roll, as well as the land; therefore, it seemed to him, that the lord could not cut the trees growing upon the copyhold. That Cro. Eliz. 361. says, the copyholder might lop the trees without a special custom, which shewed that the copyholder had a special property in them.

Ashmead v. Ranger,
1 Ld. Raym.
551.

This judgment was affirmed in the Exchequer Chamber, and reversed in the House of Lords. (a) 1 Salk. 638.

5. Where the custom of the manor is, that the copyholder shall employ the timber cut down in the reparation of his tenements, yet as to the tops and bark, which cannot be employed in repairs, he may sell them towards defraying the charges of the reparations.

Sandford v. Stevens,
3 Buls. 282.

6. The Court of Chancery will direct a commission to set out sufficient timber and wood for the copyholder, for all manner of botes and estovers, according to the custom used within the manor; and the rest for the use of the lord.

Ayray v. Billingham,
Finch 199.

7. A copyholder cannot commit any kind of waste, unless there be a particular custom to warrant it, for the timber growing on copyhold estates is, by the general custom of most

But cannot in general commit waste.
13 Rep. 68.

(a) The printed case in this appeal is in Mr. Serjeant Hill's Collection of Cases in the House of Lords, (now in Lincoln's Inn Library) on the back of which is written by Lord Chief Baron Ward—"This judgment was reversed by eleven against ten lords, and against the opinion of all the judges of England."—Note by Mr. Cruise.

manors, the property of the lord, who may cut it down; provided he leaves a sufficient quantity for the repairs of the copyhold.

Glascok's case,
4 Leon. 238.
Denn v.
Johnson,
10 East. 206.
Rolls v. Mason,
Brownl. 132.

8. A copyholder in fee may, however, by the particular custom of a manor, have a right to cut down timber trees growing on his copyhold, and to sell them at his pleasure, which has been adjudged to be a good custom. It has also been held, that where a copyholder for life had a power of nominating his successor, a custom enabling him to fell timber, was good; because he was *quasi* a copyholder in fee.

Rockey v.
Huggens,
Cro. Car. 220.
Powell v. Pea-
cock, Cro. Jac.
29. Noy. 2. ca. 5.
Mardiner v.
Elliot, 2 Term
R. 746.

9. A custom that a copyholder for life may cut down timber, is unreasonable and void; for it is a destruction of the inheritance, and contrary to the nature of an estate for life. And, in a modern case it was held, that a copyholder for three lives, without any power of compelling his lord to renew, could not cut down timber.

Whitechurch v.
Holworthy,
19 Ves. 213.
4 Mau. and
Selw. 340.

10. It has been laid down by Lord Eldon, that the lord of a manor has not by law, independently of custom, any such property or interest in the timber growing on the copyhold premises of a tenant, as entitles him to enter and cut. That generally if there is no custom for the tenants of a manor to cut timber, it belongs to the lord. That it seemed there might be, as to timber on copyhold premises, what may exist unquestionably as to mines, a custom that the lord cannot take without consent of the copyholder, and *vice versâ*. That a copyholder might, by the custom, have such an interest in the timber that he might himself cut it. So he might have a special interest to prevent the lord's cutting: but such a custom ought to be proved by extremely strong evidence.

Dunch v.
Bampton,
4 Ves. 700.
Infra, ch. 5.

11. The right of a copyholder to cut down timber is a legal one. Where he exceeds or abuses it, he will forfeit his copyhold; therefore the Court of Chancery will not grant an injunction, at the suit of a lord of a manor, to restrain his copyholder from committing waste.

Ten. 327.

12. It is laid down by Lord C. B. Gilbert, that a copyholder of inheritance cannot, without a special custom, dig for mines; neither can the lord dig in the copyholder's land, on account of the great prejudice he would thereby do to the copyhold. And this doctrine was confirmed in the following case.

13. An action of trover having been brought by the lord of a manor, by the direction of the Court of Chancery, against a customary tenant, for ore dug and disposed of by the tenant; there never having been a mine of copper before discovered in the manor, the jury could not find that the customary tenant might by custom dig and open new copper mines. Lord Cowper held that neither the tenant without the licence of the lord, nor the lord without the consent of the tenant, could dig in the copper mines; being new mines.

Ep. Winton v. Knight, 1 P. Wms. 408.

14. It was resolved in a modern case, that the lord of a manor, as such, had no right, without a custom, to enter upon the copyholds within his manor, under which there were mines and veins of coal, in order to work them; and that the copyholder might maintain trespass against him.

Bourne v. Taylor, 10 East. 189. *Curtis v. Daniel*, Id. 273.

15. Lord Coke has laid it down, that a copyholder is punishable for permissive waste; and, though there are some authorities against him, yet this appears to be now admitted. But I apprehend it only applies to copyholds held for lives, not to those held in fee. If, therefore, a copyholder for life suffers the buildings to decay, it is waste; so, if he erects a house on his land, and suffers it to fall down, it is waste.

1 Inst. 63. a. n. *Gilb. Ten.* 235.

Estcourt v. Weeks, 1 Salk. 186.

16. Where a copyhold estate is granted to a person and his heirs, it is descendible according to the rules of the common law; unless the custom is otherwise, in which case the custom must prevail. But copyholds do not in other respects partake of the nature of freehold estates of inheritance. For as they are descendible only by custom, they have not any of the collateral qualities of descent, unless those qualities are also established by the custom. (*b*)

Copyholds are descendible.

Tit. 29. c. 5.

17. Copyholds are not alienable by feoffment, or other common law assurance: but, by the general custom of all manors, a copyholder may, by surrendering his estate to the lord, to the use of a purchaser, effectually alienate it. Copyhold estates are also indirectly devisable, though not within the statute of Wills. But there are some customary estates in the north, which are not devisable, either directly or indirectly [by the custom, but it is conceived they are devisable, according to the Statute of Frauds, as if they were strictly freeholds.]

Alienable and devisable. *Tit. 37. c. 1.*

Tit. 38. c. 4.

4 East. 271.

See ch. 1. of this Tit. s. 14.

(*b*) [The alterations in the law of inheritance by the recent stat. 3 & 4 Will. 4. c. 106. apply to copyholds as well as to freeholds and lands of other tenures.]

May be leased
for years.
Co. Cop. s. 51.

6 Vin. Ab. 217.

Gilb. Ten. 299.

Turner v.
Hodges,
Hut. 102.

Gilb. 299.

Not liable to
debts.
4 Rep. 22.
Tit. 14.
Rex v. Budd,
Parker R. 190.
8 Ves. 394.

Coombes v.
Gibson, Tit. 38.

Sup. Tit. 1. s. 57.

Subject to free
bench.
4 Rep. 22. a.

18. By the general custom of all manors, a copyholder may make a lease for one year ; and, with the licence of the lord, he may make a lease for any number of years. Lord Coke says, if the lessee be ousted, he shall not sue in the lord's court by plaint, but shall have an ejectment at the common law ; because he has not a customary estate by copy, but a warrantable estate, by the rules of the common law.

19. In the case of a lease by licence of the lord, the lessee may assign it, or make an under lease for years, without any new licence ; for the lord's interest is discharged for so many years. And if the copyholder should die without heirs, yet the lease shall stand against the lord, by reason of his licence, which amounts to a confirmation.

20. The lord can only grant a licence to lease during the continuance of his own estate in the manor. Therefore a lease for years made by licence of a lord, who is only tenant for life, will cease at his death.

21. Copyholds [were not, previously to the recent stat. 3 & 4 Will. 4. c. 104.] liable to the payment of debts, even of record ; nor to debts due to the crown. Because if a creditor were allowed to take possession of a copyhold estate, it would be prejudicial to the lord. And where a copyholder in fee simple died, his estate was not assets, in the hands of his heir, as freehold lands were, for payment of specialty debts : [and for this reason, the copyholds of a trader within the Bankrupt Act were not, like other real estate, equitable assets within the stat. 11 Geo. 4. and 1 Will. 4. c. 47. s. 9.

But copyholds may be charged by will with the payment of debts.

So also the copyholds of a trader within the Bankrupt Law, may be sold for the benefit of his creditors, according to the provisions of the 6 Geo. 4. c. 16. s. 68. ; and those of an insolvent, under the enactments of the 7 Geo. 4. c. 57. s. 20. ; 2 Will. 4. c. 44.

But now, by the recent statute, 3 & 4 Will. 4. c. 104. copyholds, as well as freeholds, are made assets for the payment of simple contract, as well as specialty debts.]

22. Copyholders, not having the freehold of the lands, their widows are not entitled to dower. But in most manors in which there are copyholds, there is a custom that the widows of copy-

holders shall have a certain portion of their husband's lands, for their support, which is generally called the widow's free bench. As this right depends upon the particular customs of each manor, it varies in different manors, both as to the quantity to which the widow is entitled, and the conditions under which it is held.

23. In most manors free bench consists of one half of the husband's copyhold, in others of a third, or a fifth, and in some few of the whole. It is generally an estate for life; in many manors it is forfeited by incontinency, or a second marriage; as in the manors of East and West Emborne in Berkshire, where the widows of copyholders are entitled to free bench, *dum sola et casta fuerint*. But if a widow is found guilty of incontinency, she loses her free bench; unless she comes into Court, riding backwards upon a black ram, and repeats certain words. The same custom prevails in the manor of Chadleworth in Berkshire, and that of Torre in Devonshire.

1 Inst. 33. b.

Blount. Fragm.

24. Free bench is not incident to copyholds of inheritance alone; but also, in some manors, to copyholds granted only for life.

25. Lord Howard being seised of the manor of Stockwood in Dorsetshire, where the custom was, that the widows of copyholders for lives should enjoy, during their widowhood, the customary lands of which their husbands died seised, granted a customary tenement to John Bartlet for life, by copy. It was resolved, that upon the death of J. Bartlet his wife should have her widow's estate in the land, it being an excrescence, which by the custom grew of itself out of the estate.

Howard v. Bartlet, Hob. 181.

Salisbury v. Hurd, *infra* s. 37.

26. A right to free bench attaches before the admittance of the husband, either upon a descent or a surrender. But a widow is not entitled to free bench out of the trust of a copyhold.

Gilb. Ten. 288. Vaughan v. Atkins, Tit. 37. c. 1. Tit. 12. c. 2.

27. Where the widow of the ancestor holds a moiety of the copyhold, as her free bench, the widow of the son will only be entitled to a moiety of the remaining moiety, upon a principle established in the case of dower.

Baker v. Beresford, Raym. 58. Tit. 6. c. 3.

28. Where a widow is entitled to free bench, she shall have all the incidents to dower; and will therefore be entitled to the same damages, under the Statute of Merton, as a dowress. And where free bench determines by the act of God, there shall be

4 Rep. 30. b.

Oland's case, 5 Rep. 116. Cro. Eliz. 460. Tit. 3. c. 1.

emblemments, as in the case of a freehold estate for life. But where it determines by the act of the widow, as by incontinency, or a second marriage, it is otherwise.

Kitch. 123.

29. If the widow be entitled to the whole of the copyhold, as her free bench, she may enter immediately; as the law casts the possession upon her, in the same manner as it does upon the heir, in cases of descent. Where the widow takes a portion only, it should seem that the possession is not cast upon her, any more than in the case of dower at common law; consequently that she is not entitled to enter, without an assignment.

Chapman v.
Sharpe,
2 Show. R. 198.

30. An ejectment will not lie for a third part of a copyhold, as free bench: but the widow must levy a plaint in the manor court, in the nature of a writ of dower; and the homage must set out the same. But if the custom be for the widow to have a third part, not in the nature of dower, that is, in severalty, but in common with the heir, it is then otherwise.

Burneford v.
Packington,
1 Leon. 1.
Ten. 173.
Tit. 6. c. 2.

31. When the widow is admitted to her free bench, she holds of the lord; and the heir is not admitted during her life: which Lord Chief Baron Gilbert says, plainly proves that the course of tenure of copyholds is not like that of freeholds. For in that case she should hold of the heir.

Which may be
barred by a
jointure.

32. A jointure, whether legal or equitable, is a good bar to the claim of a widow to free bench of a copyhold; as well as to dower.

Walker v.
Walker,
1 Ves. 54.

33. A man, in consideration of his marriage, and to make some provision for his intended wife, by deed executed before marriage settled upon her, if she should survive him, part of his real estate for her jointure, and in full bar and recompence of all dower or thirds which she could be entitled to, or any way claim, out of any lands, tenements, messuages, or hereditaments, of which he then was, or ever after during the coverture, should be, seised of freehold or inheritance. After the marriage the husband purchased copyhold estates, of which the wife got possession upon his death, as her free bench. It was decreed against the widow, upon the principle that the jointure barred her of free bench, as well as of dower.

2 Ab. Eq. 101.
S. P.

And by the
alienation of the
husband.

34. The right to free bench does not, like dower, attach on all the copyhold estates which the husband had during the coverture; but only on those of which he died possessed, or as the custom usually expresses it, whereof he died seised; so that a

copyholder may defeat his wife's right to free bench, by any species of alienation. (c)

35. Where the custom of the manor was, that the wives of copyholders, dying tenants of the manor, should be endowed, a copyholder became a bankrupt; the commissioners bargained and sold his copyhold for the benefit of his creditors. The copyholder died before the bargainee was admitted. Resolved, that the widow was barred of her free bench, because her husband did not die tenant.

Parker v.
Blicke,
Cro. Car. 568.

36. A person surrendered his copyhold by way of mortgage, and died without paying off the money, leaving a widow, who claimed dower. The Court said the widow's title did not commence by the marriage: if it did, the husband then could do nothing to prejudice it; but it was plain he might alien or extinguish his right. The free bench grew out of the estate of the husband, it was his dying seised which gave the widow a title; as the husband had a defeasible estate, so the wife might have her free bench defeated.

Benson v. Scott,
4 Mod. 251.
Skin. 406.

37. Upon a motion for a new trial, it appeared that the custom of the manor of Warminster was, to grant copyholds for three lives; that the first life had a power of surrendering the whole estate; and the widow of a tenant who died seised was entitled to her free bench. That one F., then a copyholder for three lives, surrendered to Hurd, the deceased husband of the defendant, who by licence from the last lord demised to Singer for ninety-nine years, by way of mortgage. Then Hurd died, Singer demised to the plaintiff. The widow of Hurd claimed her free bench, there being no special custom to make a demise of this kind, therefore contended that the estate of her husband was not determined, according to the custom of the manor, but he must be deemed to have died seised of the copyhold, and the widow still entitled to her free bench. On the other side it was said, that the copyholder, having obtained the lord's licence, might do what he pleased with the estate, and could have conveyed it from the wife, in any form he thought fit, consequently her right of free bench must be subject to the mortgage.

Salisbury v.
Hurd,
Cowp. 481.

The Court was of opinion, that the widow was not entitled to

(c) [But in the manor of Cheltenham in Gloucestershire, the widow of a copyholder is entitled to dower out of the customary lands of which her husband was tenant during her coverture, but of which he did not die seised. Riddell v. Jenner, 10 Bing. 29.]

free bench: they held there was a great difference between the custom of free bench, found in this case, and dower; the widow was entitled to dower of all her husband was seised of during the coverture, but her right was confined to such estates as he should die seised of; consequently, as between lord and tenant, they might defeat the wife's estate when they pleased.

Vaughan v.
Atkins,
Tit. 37. c. 1.

1 Inst. 59 b.

Fardey's case,
Cro. Jac. 36.

38. A surrender of a copyhold to the lord, for the purpose of alienation, will therefore operate as a bar to free bench. And even a surrender, to the use of the surrenderor's will, bars his widow; because there the copyholder parted with his estate.

39. It was held in 2 Ja. I. that if a copyholder makes a lease for years, his widow shall not avoid it, without a special custom, because the lessee comes in under the custom, and by the lord's licence, as well as the widow.

Ten. 321.

40. Lord Chief Baron Gilbert makes the following observations on this case:—"It seems to me that the feme shall not in this case be endowed of the third part of the rent and reversion; because customs ought to be strictly pursued; and that is only to be endowed of the land. Yet it seems, after the lease ended, she shall be endowed, for the husband did die seised; the possession of his lessee being his own possession. But it was agreed in this case, that by special custom the feme might avoid the lease. This, among other cases, proves that a copyholder may dispose of his land, and bar his wife of her free bench, unless there be a particular custom that she shall avoid any alienation, &c. made by him; for then the particular custom shall, as it seems, avoid his charge, as well in the case of copyhold, as of freehold estates, by the common law."

Or even an
agreement to
convey.

Hinton v.
Hinton,
2 Ves. 631.
Amb. 277.

41. Even an agreement to convey will, in equity, bar the widow of a copyholder of her right to free bench.

42. A husband copyholder of an estate, to which, by the custom of the manor, his widow was entitled, as her free bench, in case he died seised thereof, being in gaol, entered into an agreement for the sale of that estate to his son, for a valuable consideration. The husband died without having executed the agreement, by an actual surrender of the copyhold, and passing the legal estate to the son; who brought his bill for a specific performance of the agreement to the exclusion of the widow's free bench.

Lord Hardwicke was of opinion there was a strong equity that

the widow should be bound, as well as the heir; and decreed the purchaser entitled to relief against the widow.

43. A bill was filed for a foreclosure, and to compel a surrender of a copyhold estate, under a covenant in the mortgage deed, to surrender those premises as an additional security. The question was, whether this covenant of the mortgagor barred the right of his widow to free bench. The custom of the manor appeared by the evidence to be, that the copyholder could convey these estates by surrender: but where he died seised of the estate, the widow was entitled to it during her widowhood, as her free bench.

Brown v. Raindle,
3 Ves. Jun. 256.

Sir R. P. Arden, M. R. said it was perfectly clear that the right of a copyholder's wife might be barred by her husband, by any act done for valuable consideration, whether conveying a legal estate, or otherwise. Upon the evidence, supposing this a widow's estate, arising out of an estate of which the husband was complete owner, and could bar her estate, he was of opinion it was that sort of estate which any equitable conveyance would bind. Any act of the husband for valuable consideration barred her equally with a legal surrender; and she was compellable in equity to surrender, pursuant to such contract.

44. There are, however, many manors in which the custom is, that the widow shall have her free bench of all the customary tenements whereof her husband was seised, at any time during the coverture.

45. If a copyholder does any act which, by the custom of the manor, amounts to a forfeiture of his estate, his wife will thereby lose her free bench; because every thing which determines the estate of the copyholder has that effect.

And by forfeiture.
Anon.
1 Freem. 516.
Infra, c. 5.

46. Where the lord of the manor conveys the freehold of the land to the copyholder in fee, his wife will thereby lose her free bench; because the copyhold is destroyed, as will be shewn hereafter. But if the lord grants the freehold of a copyhold to a stranger, the wife will not lose her free bench, because this does not destroy the copyhold.

And by a grant of the freehold to the husband.
Lashmere v. Avery,
Cro. Ja. 126.

47. A general devise of other lands will not bar a widow of free bench; for the same reason that it will not bar dower. But where it is expressed to be in satisfaction of dower, the widow is then put to her election.

A devise may bar free bench.
Tit. 6. c. 4.

48. A testator, after devising to his wife, declared in his will,

Ward v. Ward.
Amb. 299.

that what he had before given her, should be in full of all dower, and right of dower, or thirds, which she might have, or claim in or out of his real estate. It was decreed by Lord Hardwicke, that the devise was a satisfaction of the wife's right to free bench of a copyhold, which the testator had purchased after the making of his will ; for free bench was a customary right, *nomine dotis*, and so declared by Bracton.

Subject to
curtesy,
4 Rep. 22 b.
Cro. Eliz. 361.

49. Curtesy is not incident to copyholds, unless there be a special custom to warrant it. Where a custom of this kind prevails, it is construed strictly, and not extended beyond the words. Thus, if the custom be, that where a man marries a customary tenant, he shall have curtesy, the woman must be a copyholder at the time of the marriage.

Savage's case,
2 Leon. 109.
208.

50. The custom of a manor was, that if any man took to wife a customary tenant, had issue, and outlived his wife, he should be tenant by the curtesy. A person pleaded that he took to wife one Ann, to whom, during the said coverture, a customary tenement of the said manor did descend ; that he had issue, and that she was dead. It was adjudged that the husband was not entitled to curtesy, under the custom, because his wife was not a customary tenant at the time of the marriage.

1 P. Wms. 69.
2 Ld. Raym.
1028.
Ten. 326.

Lord Ch. Just. Holt, and Powell, Just. held this case not to be law : but it is observable, that it is stated by Lord C. B. Gilbert, without any expression of dissent.

51. Although the wife be not actually admitted to the copyhold, yet the husband will be entitled to curtesy.

Ever v. Aston,
Moo. 271.

52. The custom of a manor was, that if a man had a wife seised in fee of copyhold lands, according to the custom of the manor, and had issue by her, he should be tenant by the curtesy. It was found that A. a copyholder, was seised and had issue, a daughter, who was married to J. S. and had issue. A. died ; his daughter entered, but died without being admitted. The Court seemed of opinion that the husband was entitled to be tenant by the curtesy, before admittance of the wife ; and that the delay of admittance by the lord should not prejudice the husband, who was a third person.

Gilb. Ten. 287.

Watkins.
Vol. I. 426.

53. By the custom of some manors the husband of a copyholder is entitled to curtesy, though he has no issue by his wife. But such estate is forfeitable by a second marriage.

54. Copyhold estates are as much under the control of the Legislature as any others. But where they are not expressly mentioned in an act of parliament, it frequently does not extend to them, upon the ground that it was not the intention of the Legislature that it should affect them. And Lord Coke has laid down the following rules for distinguishing between those statutes that do or do not extend to copyholds. Where an act of parliament alters the service, tenure, or interest of the land, or other thing, in prejudice of the lord; there the general words of such an act of parliament extend not to copyholds. But where an act is generally made for the good of the commonwealth, and no prejudice may accrue by reason of the alteration of any interest, service, tenure, or custom of the manor, there usually copyholds are within the general purview of such acts.

What statutes extend to copyholds.

Cop. s. 53.

55. In conformity to these principles it is held, that the statute 4 Hen. 7. of fines, as to their being a bar after five years' non-claim; the statutes of bankruptcy, the statutes of limitations, the statutes of mortmain, the statute 7 Ann. relative to conveyances by infant trustees, and many others, extend to copyholds. It has been already stated that the statute *De Donis*, does not extend to copyholds.

1 Will. 4. c. 60. ss. 2, 6, 7.

Supr. c. 2. ss. 25, 26.

56. But it is also settled, that the statute of Westminster, 2. c. 18. which gives the writ of *elegit*, the statute 11 Hen. 7. respecting alienations by a wife of the lands of her husband, the statute of uses and jointures, the statute of wills, the statute 32 Hen. 8. as to the discontinuance, by the wife of the husband's lands, the statute 13 Eliz., for making accountants' lands liable to the debts of the Crown, and several other statutes, do not extend to copyholds.

57. Copyhold estates are within the fourth section of the statute of frauds, concerning the sale of lands, and the seventh section, which requires declarations of trust to be in writing: but they are not within the sections of the statute which relate to devises of lands.

Tit. 32. c. 3.

Tit. 38. c. 4.

58. The recent statute, 3 & Will. 4. c. 74. for abolishing fines and recoveries, applies to copyholds. Sect. 50, 51, 52, 53, 54, *infra*, title 37. c. 2.

CHAP. IV.

*Fines and Heriots.*SECT. 1. *Fines upon Descent.*

2. *Upon voluntary Grants.*
4. *Upon Admission of Tenants by the Curtesy, &c.*
5. *Upon Alienation generally.*
7. *[Upon Alienation on Bankruptcy.*
8. *On Insolvency.]*
9. *Upon a Devise.*
11. *Not due from a Remainderman.*
14. *Without a Special Custom.*
16. *Nor without a change of the Tenant.*

SECT. 17. *Or an Agreement to surrender.*

18. *Only due on Admittance.*
24. *Fines on Change of the Lord.*
29. *No more than two Years value can be demanded.*
39. *Except on voluntary Grants.*
40. *Fines must be assessed severally.*
41. *When payable.*
42. *How recovered.*
46. *Heriots.*

SECTION I.

Fines upon descent.

Gilb. Ten. 327.

4 Rep. 22 b.
Gilb. Ten. 292.

Upon voluntary grants. Co.Cop. s. 56.
4 Rep. 22 b.
Cro. Jac. 103.

WHEN copyholds were allowed to descend to the children of copyholders, the lords from whose permission and continued acquiescence the right of descent was derived, would not admit the heir of a copyholder to succeed to the land whereof his ancestor died possessed, without paying something; from which arose a custom that upon every descent of a copyhold a sum of money or fine was due from the heir to the lord, as a consideration for the renewal of the grant. And where a person enters as a special occupant, he is also liable to the payment of a fine.

2. The lord is not, however, entitled to a fine upon a descent, till the heir is admitted. If the heir refuses to come in and accept his ancestor's copyhold, the lord cannot compel him, but may seise the estate to his own use. The death of the heir, or an alienation made by him before admittance, will not, however, deprive the lord of his fine.

3. If a lord of a manor having a copyhold by escheat or forfeiture, or other means, makes a voluntary admittance to it, in which a grant is contained or implied, he becomes entitled to a fine from the new tenant.

4. Where a man acquires a copyhold by the custom of curtesy, or a woman acquires a copyhold by the custom of free bench, a fine is payable, in some manors, on the admittance of these tenants, and in others not. Upon admission of tenants by the curtesy. &c. Co. Cop. s. 56.

5. As the power of alienating copyholds was originally derived from the bounty of the lord, who is still a party to every alienation, by his admission of the alienee to become his tenant, in which a grant is implied, a fine was paid to the lord, from which arose a general custom that a fine was due to the lord upon every alienation of a copyhold. Upon alienation generally. Tit. 37. c. 1.

6. These fines are preserved by the sixth section of the statute 12 Cha. 2. c. 24.; by which it is provided, that nothing in that act shall take away any fines for alienation due by particular customs of particular manors or places.

7. [When the copyholds of a bankrupt were, under former bankrupt acts, included in the bargain and sale to the commissioners, it became necessary that the assignees should be admitted, and they were consequently subject to the payment of a fine.] Lord Hardwicke therefore recommended it to commissioners of bankrupts to except copyholds out of the assignment of the bankrupt's estate, as it would save two fines. For the commissioners might convey to the purchaser in the first instance. Upon alienation on bankruptcy. Drury v. Mann, 1 Atk. 95. Ex parte Hervey, 1 Buck. 493. and S. C. 4 Madd. 403. Vide 5 Geo. 2. c. 30. s. 26.

[The recent bankrupt act, 6 Geo. 4. c. 16. s. 64. excepts the copyholds out of the bargain and sale to the assignees; and the 66th section enables the commissioners, by bargain and sale enrolled, to sell them to the purchaser, and thereby to entitle or authorize any person on their behalf to surrender the same for the purpose of such purchaser's admission. (a)]

There cannot, therefore, now be any ground for the lord's claim of a double fine, as the copyholds do not rest in the assignees; and, consequently, their admittance, upon which the fine would become due, is unnecessary.

8. Under the late Insolvent debtor's act, 7 Geo. 4. c. 57. ss. 11. 19. all "the real estate," (which expression includes copyholds) "of the insolvent is, at the time of his subscribing his petition for Upon alienation or insolvency.

(a) The 66th section of the above act, respecting the bankrupts' estates tail, is repealed by the stat. 3 & 4 Will. 4. c. 74. s. 55.; and by s. 56. the commissioner is empowered by deed enrolled in Chancery to dispose of the entailed lands of whatever tenure to the purchaser. *Vid. infr.* Tit. 37. c. 2. *et supr.* p. 88. ss. 41, 42, 43.

discharge, to be conveyed by him to the provisional assignee of the Court, and afterwards by the latter to an assignee appointed by the Court, from among the creditors; upon this conveyance the property vests in the assignee by relation, as if the conveyance had been made in the first instance to him from the insolvent. The 20th section of the act enacts that where the insolvent is entitled to copyhold or customary estate, this conveyance shall be entered upon the Court Rolls, and thereupon it shall be lawful for the assignee to surrender to a purchaser, and in the mean time to receive the rents, for the benefit of himself and the other creditors.

These enactments supersede the necessity of a surrender from the insolvent to the assignee, and consequent admittance of the latter, who is thereby made the copyhold tenant, in the place of the insolvent, and represents him for the benefit of the creditors.

Post, ss. 16. 18. It is conceived no fine becomes payable to the lord, this in fact not being a change of ownership.

Upon a devise. 9. When a copyhold is devised by will, the devisee must be admitted, and is subject to a fine. The executor of a devisee for years of a copyhold, claiming under the testator, must also be admitted, and pay a fine.]

Earl of Bath v. Abney,
1 Burr. 206.
Lord Kenyon's Rep. 471.

10. Henry Grey having a copyhold estate, devised it to John Taylour and Arthur Lake, their executors and administrators, for 99 years, if three persons should so long live. After the death of the testator, Taylour and Lake were admitted, and paid a fine of 280*l.* Taylour survived Lake and died, having appointed Dr. John Taylour his executor. The question was, whether he was obliged to be admitted, and to pay a fine. A case being sent out of Chancery for the opinion of the Court of King's Bench, it was certified that the executor of the surviving trustee ought to come in and be admitted, and pay a fine.

Not due from remaindermen.
Brown's case,
4 Rep. 22.
Cro. Eliz. 504.
1 Mod. 102.
1 Burr. 212.

11. By the general custom of copyholds, the admittance of a tenant for life is an admittance of the persons in remainder; therefore no fine is due from them. For although there is an alteration of the tenant, yet there is no alteration of the estate: the fine not being assessed for the particular estate, but for the whole inheritance.

Barnes v. Corke,
3 Lev. 308.

12. The father being seised of a copyhold estate, surrendered it to the use of himself and his wife for their lives, remainder to his son in tail. The father and mother were admitted, and paid

a fine. Being both dead, the son prayed to be admitted to the remainder, which was done, and a fine of 58*l.* set upon him ; which he refused to pay, alleging that none was due, he being admitted by the admittance of his father and mother. It was adjudged that no fine was due, unless there was a special custom for it.

13. A copyholder of inheritance surrendered to the use of his wife for life, remainder to his youngest son in fee. The wife was admitted : but the son refused to be admitted during his mother's life. Afterwards, without being admitted, he surrendered to the use of the plaintiff in the lifetime of his mother. It was adjudged, that the admittance of the wife was the admittance of the son in remainder : for she being admitted to the particular estate, the remainder depended on that, and vested without other admittance ; for both made but one estate.

Auncelme v. Auncelme,
Cro. Ja. 31.

14. In some manors, however, fines are due, by particular custom, on the admittance of persons in remainder. But even in this case, the admittance of the tenant for life is said to be the admittance of the remainder-men, but not to prejudice the lord of the fine, to which he may be entitled by the particular custom of the manor. And it was held in the following case, that a custom requiring a remainder-man, coming into possession on the death of a tenant for life, to be admitted and to pay a fine, was good.

Without a special custom.
4 Rep. 23. a.
Blackburn v. Graves, 1 Mod. 120.

15. *E. Jenney* was admitted in 1749 to certain copyhold estates in fee, upon whose admission a full fine was paid. In the year 1765 he surrendered the lands to the use of himself for life, remainder to the defendant, then *Ann Brook* spinster, for life, with divers remainders over. On the 10th of April 1766, *E. Jenney* was admitted tenant of these lands, to hold to himself for life, according to the form and effect of the said surrender by the rod, at the will of the lord, according to the custom of the manor, by the rents and services therefore due and accustomed, saving every person's right. No fine was paid by *E. Jenney* on his admission in 1766 as tenant for life, under the marriage settlement, or assessed or paid in respect to the remainders. In August 1801, *E. Jenney*, the tenant for life, died ; the defendant (his widow) was called on to be admitted ; thereupon she appeared at a court baron of the manor, and offered to swear her fealty, or have it respited, but refused to be admitted, insisting

Doe v. Jenney,
5 East 522.
13 Ves. 253.
8 Bing. 439.

that she was the lord's tenant by virtue of the surrender and admittance of her husband. The question was, whether the lord might seize the copyhold on account of this breach of the custom. The jury having found, that by the custom of the manor, when a person who had been admitted tenant for life of a copyhold estate, holden of the manor, died, the tenant in remainder, whether for life, in tail, or in fee, should come in to be admitted, and pay a fine thereon. The Court held the custom good.

Nor with
change of the
tenant.
Co. Cop. s. 56.

16. A fine being only due as a consideration for the admittance of a new tenant, it follows that where there is no change of the tenant, no fine is due. Thus, if a copyholder surrenders for life, reserving the reversion to himself, and the tenant for life dies, the surrenderor may enter, without paying a fine, because the reversion was never out of him. So if a copyholder grants his estate to a stranger, upon condition, and afterwards enters for the condition broken, he is not liable to the payment of a fine; because he comes in of his old estate.

Or an agreement
to surrender.

17. A covenant or agreement to surrender a copyhold will not entitle the lord to demand a fine from the person with whom such covenant or agreement is made, unless he demands to be admitted.

Rex v. Lord of
Hendon,
2 T. R. 484.

18. One Benham, a copyholder of the manor of Hendon, covenanted to surrender to Goodrich; which covenant the homage presented at the lord's court, and the consideration-money was paid; but no surrender was ever made to him. Goodrich then assigned his interest in the copyhold to one Rankin, who claimed to be admitted. The lord of the manor resisted the application, on the ground that no fine had ever been paid him for the conveyance to Goodrich; that this was a mode of cheating him of his fines; that therefore, before Rankin was admitted, he ought to pay both the fines that were due.

The Court said, that all the lord had a right to require was, to have a tenant; in this case he had one during the whole time; that any private agreement between Benham and Goodrich, not followed up by a surrender of the estate, could not give the lord of the manor a right to a fine, notwithstanding it was presented by the homage.

Only due on
admittance.

19. A fine being only due on the admittance of a new tenant, it follows, that where a person who acquires an interest in a copyhold is not obliged, from the nature of that interest, to

be admitted tenant to the lord, he is not subject to the payment of a fine.

20. Thus, if a person marries a woman having a copyhold, though an interest becomes thereby vested in him, yet as he is not seised *jure proprio*, but only *jure alieno*, he is not obliged to be admitted; therefore he is not liable to the payment of a fine. So if a married woman be a termor of a copyhold; for though the term becomes vested in the husband by the marriage, so that he may dispose of it, if he pleases, yet he is only possessed of it in right of his wife.

Co. Cop. c. 56.

Tit. 8. c. 1.

21. Where by the custom of a manor the bailiff is to have the wardship of the heir of a copyholder, he shall not be admitted, or pay a fine; because he is but a pignor of the profits, not in his own right, but in right of his ward.

Co. Cop. s. 56.

22. Where a testator directs certain persons to sell his copyholds, they need not be admitted; consequently are not liable to the payment of a fine.

23. A person seised in fee of copyhold lands, by his will, directed that A. and B. should make sale thereof, and apply and dispose of the monies arising therefrom in the manner mentioned in his will. A. and B. bargained and sold the lands by deed to one Ray and his heirs. Ray claimed to be admitted under this deed, which the lord of the manor refused, insisting that the trustees should have been admitted to the said premises, previous to their making sale thereof, and have paid a fine for their admission. The Court was of opinion, that the trustees were not obliged to be admitted, because they had no estate or interest, but only a naked power or authority; and that the lord was bound to admit the purchaser to the copyhold.

Holder v. Preston,
2 Wils. Rep.
400.

24. By the custom of many manors, fines are due from copyholders on every change of the lord, which happens by the act of God.

Fines on change
of the lord.

25. Upon the death of the Duchess of Somerset, the duke her husband, who was tenant for life in remainder after the duchess, under the settlement made on his marriage, claimed a general fine of the several customary tenants of the manors of Cockermouth, &c. in the county of Cumberland, which were the inheritance of the duchess. The duke having assessed their fines, and the tenants refusing to pay them, the duke brought his bill in the Court of Chancery, to establish his right to these fines,

Duke of Somerset v. France,
1 Stra. 654.

as the next admitting lord. The bill stated that it was the custom of these manors for the lord or lady thereof for the time being to admit the several tenants of the manors to their respective estates. That, by virtue of such admittance, the several tenants had a right to hold their respective estates during the joint lives of such tenant and such admitting lord or lady. That in consideration of such admittances, the tenants had, time out of mind, respectively paid to such admitting lord a fine or *grassum*, which had been generally assessed by the lord's steward, at a court held for that purpose, called the court of demissions. That these fines or *grassums* were called the general fines; and were due to the next succeeding lord, upon the death of the last admitting lord, by whose death there was a general determination of the estates of the tenants. The fines which the duke demanded were the general fines, which he insisted were due to him as next admitting lord, upon the death of the duchess. The bill set forth that the duchess, being the lady of these manors, and having married the duke, a court of demissions was held in the names of the duke and duchess, in order to grant the tenants new estates, their former ones having been determined by the death of the duchess's father. At such courts admittances were granted to the several tenants, during the joint lives of the duchess and the tenants. That, upon the death of the duchess, the duke became lord of the said manors, and the tenants' estates being determined by the death of the duchess, the duke, as next admitting lord, had a right to a general fine.

The defendants in their answer insisted, that by the customs of these manors, a lord who was tenant by the curtesy, or a lady tenant in dower, had no right to a general fine: that they were only obliged to pay a general fine to the lord who came in by descent, or to him that came *in loco hæredis*. That although the duke was become tenant for life of these manors by the duchess's death, yet no fine was due to him; for if he had been tenant by the curtesy, no fine would have been due, and his claiming by settlement could not better his case; for then it would be in the power of the lords of such manors to multiply the tenants' fines, and greatly burthen their estates, if every such lord who had an intervening estate by settlement should be entitled to a general fine.

Lord King said the principal question was, whether a fine

was due to the duke from his tenants, upon the death of the duchess? In resolving this question it was first to be considered upon what account these general fines became due. Now it appeared from the nature of the admittances, that upon the death of the last admitting lord, all the estates of the tenants, which were held under his admittances, were determined; and their estates being so determined, it was necessary for the tenants, before they could have any new estate, to have a regrant from the succeeding and next admitting lord, which regrant they had a right to, and that right gave their estates the denomination of tenant-right estates. From hence it appeared that the fines were paid upon account of the admission to the new estate; therefore, that the lord who had a right to admit, had a right to the fines. The lord granted the tenant a new estate; in consideration of that, a fine became due to him from the tenant. The only question then seemed to be, whether the duke had a right to admit, and the tenants seemed to agree that he had; for they allowed that if a particular tenant died, the duke upon the admission of his heir was entitled to a dropping fine; nor could the duke be entitled to a dropping fine, if he was not the admitting lord. If he had power to admit, and had a right to a fine upon the determination of a particular estate, upon the death of a particular tenant, why had he not an equal power to admit, and an equal right to his fines upon the determination of the tenants' estates in general, by the death of the last admitting lord? It was very extraordinary to allow it in the one case, and not in the other. If a particular tenant died, his estate was determined, and his heir must pay a fine to the duke; yet if the last admitting lord died, all the estates were determined, yet the duke had no right to a fine. It had been objected that this was multiplying the fines of the tenants, and subjecting them to frequent burthens of this kind: but where was the inconvenience to the tenants? they were still to hold during their own lives, and the life of the lord who admitted them; that was the very tenure of their estates. Nay, if a lessee for years, or any other *dominus pro tempore*, should admit them, their estates would be good, according to these admittances, during their own lives and the life of such lord; and the determination of the lord's estate would have no influence upon theirs.

Indeed, if there should appear to be any fraud or contrivance

in a settlement of this kind, by putting in a number of lives successively, on purpose to multiply the fines of the tenants, the Court would undoubtedly interpose in such a case, and relieve them : but in this case nothing of that kind could be pretended. These were his thoughts on the subject : but as an issue had been insisted on, he readily agreed to it.

An issue was accordingly tried at the bar of the Court of King's Bench by a jury of Middlesex. Whether a general fine was due to the Duke of Somerset, from the tenants of the manors of Cockermouth, &c. as next admitting lord, upon the death of the Duchess of Somerset. The jury, by the direction of the Court, brought in a verdict for the Duke of Somerset.

The cause came on again before the Chancellor, who decreed the tenants to pay their fines, and gave the duke his costs.

26. By the custom of many manors in the north, a fine is due on the death of the last admitting lord ; whether he was in possession of the manor at the time of his death or not. And this custom has been held good by the House of Lords.

27. Philip Duke of Wharton became entitled by descent to several manors in Cumberland and Westmoreland, in which the custom was, that the tenants should pay a fine upon the change of a lord by death. In the year 1721, the duke sold these manors to Mr. Lowther ; and having afterwards withdrawn himself from the kingdom, he died in Spain in the year 1721. Mr. Lowther assessed a general fine upon all the tenants, in consequence of the Duke's death, which they refused to pay ; he filed his bill in Chancery, to compel the payment of them. Lord Talbot dismissed the bill ; but the House of Lords reversed the decree, and declared that Mr. Lowther became entitled to a general fine on the death of the duke.

28. But a custom that fine is due on every change of the lord, be it by alienation, demise, death, or otherwise, is a custom against law, as to the alteration or change of the lord, by the act of the party ; for by that means the copyholders may be oppressed by a multitude of fines.

29. With respect to the *quantum* of the sum which may be demanded as a fine. It is probable that when fines were first introduced, they were at the mere will and discretion of the lords. The benevolence of some lords established fines certain in particular manors, while they continued uncertain in others. Nor

Lowther v.
Raw, 2 Bro.
Parl. Ca. 451.

1 Inst. 59. b.

No more than
two years' value
can be de-
manded.

does it appear that the courts of law interposed, before the reign of Queen Elizabeth, to moderate the exercise of the lord's right to demand whatever he pleased, where the custom had left the amount of the fine uncertain.

30. It was resolved by the Court of King's Bench, in 42 and 43 Eliz. that if the fines of copyholders upon admittance be uncertain, yet the lord cannot demand or exact excessive or unreasonable fines; that if he does, the copyholder may by law refuse to pay them. And it shall be determined by the opinion of the justices, before whom the matter is depending, either upon demurrer, or upon evidence to a jury, upon confession or proof of the yearly value of the land, whether the fine demanded was reasonable or not. For if the lord might assess excessive fines at his pleasure, all the estates of copyholders would be, at the will of the lord, defeated and destroyed.

Hobart v.
Hammond,
4 Rep. 27. b.

31. A lord of a manor demanded a fine of 5*l.* 6*s.* 8*d.* for an admittance, upon a surrender to a cottage and an acre of pasture, which was let at a rack rent of 53*s.* a year. It was resolved—1*st.* That although a fine be uncertain and arbitrary, yet it ought to be *secundum arbitrium boni viri*, that is, reasonable, and not excessive; for *excessus in re quolibet, jure reprobatu communis*. The common law forbids any unreasonable distress; if an excessive or unreasonable amercement be imposed in any court baron, or other court, which is not of record, the party shall have *moderate misericordia*. 2*d.* That if the lord and tenant cannot agree about the fine, and the lord demands more than a reasonable fine, the same shall be decided and adjudged by the Court in which any suit shall be brought on account of the denial of such fine. 3*d.* That the fine demanded in this case was unreasonable; for this was not a voluntary grant, as where the copyholder has but an estate for life.

Willowe's case,
13 Rep. 1.

32. In trespass the question was, whether the lord might assess two years and a half's value of the land, according to the rack rent, for a fine; all the Court held he could not, for it was unreasonable; that one year and a half's rent, according to the improved value, was high enough; but that the tenant might refuse to pay two years and a half.

Dow v. Golding,
Cro. Car. 196.

33. Lord Keeper Coventry in 5 and again in 12 Cha. I. held that one year's improved value was a reasonable fine; guarding the decree, that one year's value should not be counted a fine.

Middleton v.
Jackson,
Rep. in Cha.
18 id. 51.

certain, but referable to the discretion of the court, whether it was reasonable or not, and that the payment was then directed, because it was reasonable. But it appears to have been settled about the latter end of the reign of King Cha. II. two years' improved value is a reasonable fine, in the case of a fine arbitrary, or, more properly, arbitrable. And the court will not permit a lord to take more.

Doug. Rep.
726. n.
6 East. 56.

1 Watk. on
Cop. 374. 4th ed.

34. Where a person is admitted to an estate in remainder, the fine is usually one half. But a tenant for life must pay the whole fine, equally as if he were tenant in fee, in cases where the heirs are finable. For the admission of the tenant in fee is only the admission of an individual. When he dies, his heir must be admitted.

1 Burr. 207,
217.
1 Watk. 375.

35. In some manors the fine usually taken for two lives is as much and half as much as the fine for one life; and the fine for three lives is as much and half as much as the fine for two lives. This must be understood of persons taking *successive*, or one after another; for if they take as joint tenants, or tenants in common, it would be different.

36. It has been stated, that a person who acquires a copyhold as a special occupant, is liable to a fine as purchaser. But this fine should be proportioned to the probable duration of the life of the *cestui que vie*.

Halton v. Has-
sell, Stra. 1042.
Grant v. Astle,
Doug. 724. n.

37. The fine must be estimated according to the improved yearly value; not according to the rent under a lease. And in a modern case it was held, that no deduction was to be made out of the two years' full improved value on account of the land tax: but quit rents were always deducted.

Cowper v. Clark,
3 P. Wms. 155.

38. A bill in Chancery cannot be brought by a copyholder to be relieved against an excessive fine, for that ought to be tried by a jury. But a bill will lie to settle a general fine, to be paid by all the copyhold tenants of a manor, in order to prevent a multiplicity of suits. (c)

Except on vo-
luntary grants.

39. Where copyholds are only granted for lives, without any tenant right of renewal, and fall into the lord's hands, there the

(c) [In *Wilson v. Hoare*, 2 Bar. & Adol. 350. where by the terms of a decree regulating charity lands which were copyhold, whenever 14 trustees were reduced to 5, a new admission was requisite, the Court of K. B. held that the proper rule for estimating the fine to be paid to the lord was to take for the second life half the sum taken for the first; for the third, half the sum taken for the second and so on.]

fine is uncertain; because it being in the option of the lord to renew or not, he may demand whatever sum he pleases. In order, therefore, to support a custom of renewal of copyholds for lives, the plaintiff must allege such custom to be on payment of a fine certain: for it will not be sufficient to allege it to be on payment of a reasonable fine, on account of the difficulty of ascertaining the *quantum* of such fine. But if a custom be not found to renew, on payment of a fine certain, the lord may insist on his own terms; and the only proof that can be given of such a custom is, the fact of renewals having taken place according to some certain standard, that is, upon a fine certain.

Wharton v. King, Anst. R. 659.

Grafton v. Horton, 2 Bro. Parl. Ca. 284.

40. Where a person holds several copyholds of the same manor, the lord must assess, and demand the fines severally. For the tenant may refuse to pay the fine for one, and pay it for the others. And Lord Coke says, if two joint tenants, two tenants in common, or tenant for life, and the remainder man, join in a grant of a copyhold, one fine only is due. But this has been denied in a modern case, as to tenants in common, who have several estates.

Fines must be assessed severally. Co. Cop. s. 56. 4 Rep. 28. a.

Attree v. Scutt, *infra*, s. 56.

41. Where a fine is certain, the tenant is bound to pay it immediately upon his admittance; otherwise where it is uncertain; because as the copyholder cannot tell what the lord will assess, it would be impossible for him to provide the precise sum, therefore he will be allowed a convenient time.

When payable. 4 Rep. 28. a. Dalton v. Hammond, Cro. Eliz. 779. Gilb. Ten. 218.

42. The lord may bring an action of debt against a copyholder for the recovery of his fine. But if a copyholder in fee dies, and his heir waives the possession, the lord cannot bring an action against him for the fine; but may seize the copyhold.

How recovered. *Ante*, s. 2. 3 P. Wms. 151. Doug. R. 727. n.

43. If a copyholder be admitted, and before payment of the fine the lord dies, and the manor descends to his son and heir, who also dies; the executor of the son may maintain an action of *assumpsit* against the copyholder, to recover the fine; whether it be a fine certain, or at the will of the lord.

Shuttleworth, v. Garnett, 3 Mod. 239.

44. The lord may recover from the copyholder the fine assessed by him on admittance, though there be no entry of the assessment on the court rolls, but only a demand of such a sum for a fine, after the value of the tenement is found by the homage.

Northwick v. Stanway, 6 East. 56.

45. [By the stat. 11 Geo. 4. and 1 Will. 4., which repeals the 9 Geo. 1. c. 29., and substitutes amended enactments, it is provided, s. 3. that infants, femes covert, and lunatics may be ad-

mitted in person to copyhold lands, or by their guardians, attornies, or committees: and by s. 4. *femes covert* and infants are empowered to appoint attornies for the above purpose. By s. 5. the lord, in default of appearance, is empowered to appoint an attorney. By s. 6. it is declared in what manner the fines on admittance shall be demandable; and, if not paid within three months, the lord is empowered to enter on the copyholds, and receive the profits, until he is paid his fines, costs, &c. By s. 7. it is provided that, after satisfaction of the fines, possession shall be delivered up: and by s. 8. guardians, husbands, or committees, paying fines, are authorized to reimburse themselves out of the rents and profits, notwithstanding the death of such infants, *femes covert*, or lunatics, before the sums expended shall be so raised and reimbursed.

Heriots.
Co. Cop. c. 24.
Bro. Ab.
Heriot, pl. 5.

46. Besides a fine there is also a custom in many manors, that upon the death of every copyholder, though only for life, the lord becomes entitled to his best beast or *averium*. In some manors it is the best chattel, under which a jewel or piece of plate is included; but it is always a personal chattel, which immediately on the death of the tenant, being ascertained by the option of the lord, becomes vested in him as his property, and is no charge on the lands, but merely on the goods and chattels of the tenant.

Parker v.
Combleford,
Cro. Eliz. 725.

47. A custom that the lord of a manor shall have the best beast of every person who dies within the manor, whether he be a copyholder or not, is void; for it cannot have a lawful beginning between the lord and a stranger.

48. Although a copyholder be ousted or disseised, yet the lord will be entitled to a heriot on his death; for he continued to be a legal tenant.

Norrice v.
Norrice,
2 Roll. Ab. 72.

49. A copyholder for life, in a manor where the custom was, that if the tenant died seized, a heriot should be paid, was disseised or ousted, and died; the lord having first granted the seigniority to A. for 99 years, if the tenant should so long live, remainder to B. for 4000 years. Two questions were made—1st, Whether any heriot should be made, because the copyholder did not die seized. As to this the Court held clearly, that a heriot was due and payable; for, notwithstanding the ouster and disseisin, the copyholder still continued legal tenant; and such disseisin might have been by combination to defeat the lord of his heriot. 2d, To whom the heriot should be paid. As to this the

Court held clearly, that the remainder man for 4000 years could have no right to it, because the copyholder was never his tenant; and as to the grantee for 99 years, it was doubted, because the moment the copyholder died, his estate was determined.

50. A heriot is only due on the death of the legal tenant; not on the death of the person entitled to an equitable estate in a copyhold. And the lord is only entitled to a heriot on the death of the tenant who has an interest in the copyhold, not on the death of persons for whose lives a copyhold is granted.

Trin. Col. v. Brown, 1 Vern. 441.
2 Ld. Raym. 994.

51. If a copyholder for life, on whose death the lord is entitled a heriot, becomes a bankrupt, and the copyhold is assigned for the benefit of the creditors, this transmutation of the tenant, by act of parliament, shall not work a prejudice to the lord, who shall have a heriot on the death of the copyholder, but not on the death of the assignee.

2 Ld. Raym. 1002.

Vide supra, ss. 7, 8.

52. No heriot is due on the death of a married woman, because she can have no chattels.

Anon. 4 Leon. 239.

53. In many manors there is a customary composition, as ten or twenty shillings, in lieu of a heriot; by which the lord and tenant are both bound, provided it be an indisputably ancient custom. But a new composition of this kind will not bind the heirs or representatives of either party; for that amounts to the creation of a new custom, which cannot now be done.

54. If a heriot be due by the custom of the manor, upon the death of the tenant, and the lord purchases part of the tenancy, such purchase will not extinguish the lord's right to a heriot; for the tenant is still within the lord's homage.

8 Rep. 106. b.

55. Where a copyholder is bound to pay a heriot, and he conveys part of his copyhold to one person and part to another, the heriot will be multiplied. It is the same if he devises it by will to several persons in severalty.

Snag v. Fox, Palm. 342.

56. It was resolved in a modern case, that where a copyhold estate was divided into two parts by a devise of it to two persons, as tenants in common, each of the devisees was subject to the payment of a separate fine, and to a several heriot, that if one of the two persons surrendered his moiety to the other, the estates, notwithstanding, continued several, and were subject to several heriots. For if an estate held by indivisible services was divided and holden in severalty, and afterwards, by the act of the parties, came again into one hand, the services which were multiplied

Attree v. Scutt, 6 East, 476.

should continue to be payable, not as for one tenement, but for each portion respectively, that is, as for distinct tenements; for they did not again become, in respect of the lord, one tenement. That this doctrine was as applicable to an estate held in common, as to estates held in severalty.

2 Inst. 131.
Austin v.
Bennett,
1 Salk. 356.

57. In the case of heriot custom, the lord may seize the best beast of the tenant, or whatever is due as a heriot, wherever he can find it, either within the manor or out of it; even on the highway.

Parker v. Gage,
1 Show. Rep.
81.

58. In trover on not guilty before Lord C. J. Holt, the question being about a horse seised for a heriot, it was held, that either heriot service or heriot custom was seizable off the manor, because it lies in prender.

Dyer, 351. b.

59. If a man shortly before his death bargains and sells all his horses to another, without any consideration, to defraud the lord of his heriot, it is void.

Wirty v. Pemberton, 2 Ab.
Eq. 279.

60. The Court of Chancery will not interpose in favour of the lord in the case of heriots, because the custom is unreasonable, the loss a family sustains being thereby aggravated.

CHAP. V.

*Forfeiture of Copyholds.*SECT. 2. *Attainder of Treason or Felony.*

5. *Alienation contrary to the Custom.*
8. *Leases contrary to the Custom.*
11. *Unless by Licence of the Lord.*
13. *A Covenant that a Person shall enjoy is no Forfeiture.*
17. *Waste.*
19. *Disclaiming the Tenure.*
20. *Refusal to perform the Services.*
25. *Refusal to pay Fines.*
27. *Refusal to pay Rent.*
30. *Non-appearance of the Heir to be admitted.*

SECT. 35. *Of a Person in Remainder.*

38. *Of a Surrenderer.*
39. *Of a Devisee.*
41. *Who may Forfeit.*
46. *Extent of Forfeiture.*
48. *Where Presentment is necessary.*
50. *What dispenses with a Forfeiture.*
56. *Who may take advantage of a Forfeiture.*
59. *Where Equity relieves.*
63. *Where Relief has been refused.*

SECTION I.

As copyholds were originally held by the lowest and most abject vassals, the marks of feudal dominion continue much stronger in this tenure than in any other; so that copyholds are not only subject to the same forfeiture as estates held in socage; but also to a variety of other forfeitures particularly incident to them.

2. If a copyholder be attainted of high treason, his estate becomes forfeited to the lord of the manor, not to the crown; unless by the express words of an act of parliament. It is the same where a copyholder is attainted of felony. (a) But a person to whom a copyhold is devised, who is convicted of felony, and hanged, before admittance, does not forfeit such copyhold.

3. Mr. Jefferies devised a copyhold to his niece Elizabeth Jefferies, who was convicted and hanged for the murder of the

Attainder of treason or felony.
Hawk. P. C. c. 49. s. 7.
Skin. R. 8.
1 Watk. Cop. 417. [348]

Roe v. Hicks,
2 Wils. R. 13.
Lord Kenyon's Rep. 110.

(a) [See stat. 54 Geo. 3. c. 145. *et supra*, Tit. 1. s. 73.]

testator. Miss Jefferies was not admitted, nor ever did any act to shew that she was the lord's tenant. The Court was of opinion that Miss Jefferies had no legal interest in the copyhold, so could have no legal remedy to recover it; and having neither *jus in re*, nor *ad rem*, could not forfeit any thing.

The King v.
Willes, 3 Barn.
& Ald. 510.

4. It was resolved in a modern case that a copyhold of inheritance was not forfeited by a conviction of felony, without attainder; unless there be a special custom in the manor.

Alienation con-
trary to the cus-
tom.

5. Copyholders can only alienate their estates in manner prescribed by the custom; any other mode of alienation will operate as a forfeiture. Thus it is said by Littleton, s. 74. that if a copyholder aliens by deed, it is a forfeiture; for a copyholder being tenant at will, such an act would amount to a determination of his will.

1 Inst. 59. a.
n. 3.
Co. Cop. s. 58.
1 Roll. Ab. 508.
pl. 12 & 13.

6. Lord Coke says, if a copyholder makes a charter of feoffment, or a deed of demise, for life, without giving livery of seisin, it is no forfeiture, because nothing passes. According to Roll, though livery is not made, yet the feoffment is a forfeiture, if there be a letter of attorney to deliver seisin; because then the feoffee may at any time perfect the conveyance. And that Lord Coke ought to be understood with that distinction.

1 Inst. 59. a.
n. 3.

Mr. Hargrave does not acquiesce in Roll's doctrine. "For (says he) the criterion of forfeiture of a copyhold by alienation, seems to be the actual passing of an unlawful estate, to the lord's prejudice. In the case of the feoffment, no interest can pass until livery; nor is it strictly true that the feoffee may at any time perfect the conveyance; for it is possible that before livery, the feoffor may revoke the power of attorney, or the attorney may die, or refuse to execute the authority.

Vol. I. 508.
pl. 11.

7. It is also said in Roll's Abridgement, that if a copyholder bargains and sells his copyhold to another in fee, it is a forfeiture; although the deed be not enrolled. But this position has been denied by Lord Coke.

Co. Cop. s. 58.

Leases contrary
to the custom.
4 Rep. 26. a.
1 Bulst. 190.
Jackman v.
Hoddeston,
Cro. Eliz. 351.
East v. Harding,
Id. 498.
6 Vin. Ab. 118.

8. It has been stated that a copyholder may make a lease for one year: if he makes a lease for any longer term, whether by indenture or parol, without the consent of the lord, it is a forfeiture; unless there be an express custom to warrant it. But by the particular custom of some manors a copyholder of inheritance may lease his land for three years, without the consent of the lord.

9. Where a copyholder leased for one year, and so from year to year, during the life of the lessor; reserving to the lessor in every year the 25th day of March, it was held to be a forfeiture. For it was a lease for two years at least, reserving one day; so that a greater estate than for one year passed in interest. And the reserving a day in every year was but a shift to avoid the forfeiture.

4 Rep. 26. a.
Cro. Jac. 308.

10. A copyholder agreed to make three several leases by indenture, one to commence after the other, there being two days between the end of the first, and the commencement of the second, and so between the second and third. He made them accordingly, and sealed them at the same time. This was held to be a forfeiture, for it was an apparent fraud; and a greater estate than for one year passed presently.

Mathews v.
Wheaton,
6 Vin. Ab. 119.

11. It has been stated that a lease for any number of years, made by licence from the lord, is not a forfeiture; and that in such case the lessee may assign his term, or make an underlease, without any new licence; for the interest of the lord is discharged by the licence.

Unless by li-
cense of the lord.
Ante, c. 3.

12. Lord Ch. B. Gilbert says, if the lord licenses the copyholder to let for five years, and he lets for three, this is good. So if the lord licenses a copyholder for life to let for five years, if the copyholder so long live, and he lets for five years absolute, this is good; for the limitation is implied by law, and so need not be expressed. But if the copyholder had an estate in fee, it had been a forfeiture, to make an absolute lease for five years; because in that case he did more than his licence allowed.

Ten. 296.

Hall v. Arrow-
smith, Poph.
103.

13. Where a copyholder made a lease for a year only, according to the custom, and covenanted that, after the end of the year, the lessee should have the lands for another year, and so *de anno in annum* for ten years, it was held to be no such lease as would make a forfeiture, because the lessee had a lawful estate but for one year only.

A covenant that
a person shall
enjoy is no for-
feiture. Mon-
tagne's case,
Cro. Jac. 301.

14. Lord Ch. B. Gilbert seems in the first instance to doubt this case, because the words covenant and grant make a lease. He afterwards however says—"But in another case it was held that these words by construction might make a lease, where the lands might be let, but otherwise where the lands could not be let, which distinction seems very reasonable, for the words themselves do not import a lease; and it would be a very inju-

Ten. 233.

Tit. 32. c. 5.

rious construction to make them a lease, and so a forfeiture, when they only import of themselves a covenant."

Tit. Lease I. 6. 15. It is said in Bacon's Abridgement, that in such a covenant, it would be better if the words were, *to permit and suffer* the lessee to hold the lands. For a covenant in that form, respecting freehold lands, would not amount to an immediate lease; because the words *permit and suffer* would prove that the estate was still to continue in him from whom the permission came. For if any estate thereby passed to the covenantee, he might hold and enjoy it without any permission from the covenantor; therefore in such case the covenantee would only have the bare covenant for his security of enjoyment, without any actual estate made to him.

1 Inst. 59. a. n. 4. 16. Mr. Hargrave appears to acquiesce in this doctrine.—
"Because (says he) though in general a covenant amounts to a lease, yet it seems harsh to give such a construction, where a lease amounts to a forfeiture, and the intention of the parties may have effect by way of agreement." And in a modern case, **Doe v. Clare, 2 Term R. 739.** it was settled that an executory agreement for a lease of a copyhold did not operate as a forfeiture.

Waste. Anie, c. 3. 17. Every species of waste, whether voluntary or permissive, not warranted by the custom of the manor, will operate as a forfeiture of a copyhold. Lord Coke says, if a stranger commits waste on a copyhold, without the assent of the copyholder, it will operate as a forfeiture. In Comyn's Digest, Tit. Copyhold, M. 3. the contrary doctrine is said to have been settled in **Lutw. 802.** But Lord Hardwicke appears to have considered copyholders as answerable for waste, in all cases; except where occasioned by the act of God.

Attorney General v. Vincent, 2 Ab. Eq. 378. Doe v. Wilson, 11 East, 56. 18. Where a copyholder cut down more timber than he could justify, and a bill being brought against him in Chancery, for a discovery; he demurred, because it would subject him to a forfeiture, as being waste. The demurrer was allowed.

Disclaiming the tenure. Co. Cop. s. 57. 19. If a copyholder disclaims holding of his lord, or swears in Court that he is not the lord's copyholder; or if the steward shews the court-roll to a copyholder, to prove that his land is held by copy, and the copyholder asserts his estate to be freehold, and tears the court-roll, these acts will operate as a forfeiture. But if a copyholder, in presence of the Court, speaks irreverent words of the lord, as that he exacts and extorts unreasonable

finer and undue services, this is fineable only, and no forfeiture. So if he says in Court that he will devise means to be no longer the lord's copyholder, this is neither cause of fine nor forfeiture; for perhaps the means he intends are lawful, by conveying away his copyhold.

20. Copyholds are also forfeited by the neglect or refusal of the tenant to perform the services required by the custom. Thus if a copyholder neglects to appear at the Court after summons, he will forfeit his estate. But to make this a forfeiture there must be a particular warning to each tenant, or a general notice within the parish, after which it is a forfeiture without any express refusal: for unless the copyholders attend, no court can be held, which would be highly prejudicial, not only to the lord, but to the tenants.

Refusal to perform the services.

6 Vin. Ab. 128.
Gilb. Ten. 229.

21. A copyholder neglected to do his suit and service for the space of three years together. The question was, whether this was a sufficient cause of forfeiture. It was said by the Court that it was no cause of forfeiture, if a warning was not given by the lord, of the time when his court was to be held, and notice thereof given to the copyholder himself: that the withdrawing of his suit by a copyholder was only finable; but if he refused to do his suit and service, then it was a forfeiture.

Hammond v. Wennibank,
3 Buls. 368.

22. Where the lord required the copyholder to do his services, and he answered that if they were due he would do them, but it should be tried at law whether they were due or not; this was held not to be a forfeiture.

Gilb. Ten. 230.

23. If a copyholder is confined by sickness, or is afraid of being arrested, or is a bankrupt, he will be excused from attending the lord's court.

Co. Cop. s. 57.

24. When the copyholders are assembled in the lord's court, they are bound to do the proper business of the court; and if they refuse, it will amount to a forfeiture.

Idem.
Dyer 211. b.

25. The refusal of a copyholder to pay the fine due on his admittance is a forfeiture, provided such fine be certain. Where the fine is uncertain, a refusal to pay the fine assessed by the lord, upon the ground that a greater fine is demanded than is warranted by the custom, will not amount to a forfeiture. If the fine be uncertain, though a reasonable fine be assessed, yet as no one can provide for an uncertainty, the copyholder is not bound to pay it presently upon demand, but shall have a conve-

Refusal to pay fines.
Dalton v. Hammond,
Cro. Eliz. 779.
Ante, c. 4.

Co. Cop. s. 57.
Gardiner v. Norman,
Cro. Jac. 617.

nient time to discharge it, where the law does not appoint a day certain for its payment. If, however, it is not paid on the day appointed, the estate will be forfeited.

Willows's
case, 13 Rep. 1.

26. Though the fine assessed be reasonable, yet the lord must appoint the time and place where it must be paid; because it stands upon a point of forfeiture of the estate: and the copyholder is not obliged to carry his fine always about him. But where the fine is certain, the copyholder is obliged to pay it immediately upon admittance.

Refusal to pay
rent.
Co. Cop. s. 57.
Gilb. Ten. 225.

27. Where a copholder is bound by the custom to pay a certain rent to the lord, and refuses to pay it, he will forfeit his copyhold. But such refusal must be founded on the principle that the lord has no right to the rent; which implies a disclaimer of the tenure. For if the copyholder admits the lord's claim to the rent, but says he has no money, or makes any other excuse of that sort, it will be no forfeiture.

Crisp. v. Freer,
Cro. Eliz. 505.

28. Where a copyholder was absent when the lord demanded the rent, and no person was there to pay it, which is a refusal in law, yet the Court doubted whether it was a forfeiture, as it did not amount to a voluntary refusal: and two of the judges said, there ought to be a demand from the person of the copyholder, to make it a forfeiture.

Hob. 135.
Gilb. Ten. 225.

8 Rep. 92. a.

29. Where the estate of a lord of a manor ceases by limitation of a use, and is thereby transferred to another person, who demands rent of the copyholder, and he refuses to pay it, this is no forfeiture, without notice given to the copyholder of the alteration of the use and estate.

Non-appear-
ance of the
heir to be ad-
mitted.

30. Where copyholds are descendible, the heir is bound, on the death of his ancestor, to come to the lord's court, and require to be admitted. If he neglects to appear within the time prescribed by the custom, a proclamation is made for him to come in and be admitted; if he does not then appear, farther proclamations are made at the two or three next courts, according to the custom; and if he does not appear immediately after the last proclamation, the lord may seize the copyhold as forfeited.

Gilb. Ten. 231.

31. If, however, the heir of a copyholder is beyond sea at the time of his ancestor's death, or within age, or *non compos mentis*, or in prison, his non-appearance at the lord's court to be admitted will not amount to a forfeiture.

case. 32. The custom of a manor was, that those who claimed

copyholds by descent, ought to come at the first, second, or third court, upon proclamation made, to take up their estates, or else they should be forfeited. A tenant of the manor, having issue inheritable by the custom, died, such issue being at that time beyond sea; the proclamations all passed, and the heir did not appear for two years; upon his return he prayed to be admitted to the copyhold, and proffered the lord his fine in court, which the lord refused to accept, or to admit the heir, but seised the land, as forfeited. It was adjudged, that this was no cause of forfeiture, because the heir was beyond sea at the time of the proclamations: and the lord was at no prejudice, for he had taken all the profits of the land in the mean time.

Underhill v.
Kilsay, Cro.
Jac. 226. S. P.

33. It seems to be now held, that there must be a particular custom to warrant the forfeiture of a copyhold, by the mere non-appearance of the heir to be admitted. That by the general custom, the lord is only authorized to seise the land, until the tenant comes in to be admitted. It is also required, that all the proceedings be strictly conformable to the customs of the manor; and the proclamations proved *viva voce*, not by the court rolls only; otherwise no forfeiture will be incurred.

Lord Salisbury's case,
1 Keb. 287.

34. At a court baron holden for the manor of Featherstone in 1785, the homage presented the death of Sir S. Helier, and an entry of a proclamation on the rolls was made as follows:—"At this court public proclamation was made, for the first time, for the heir of Sir S. Helier, knight, deceased, to come into court, and be admitted tenant to all and singular the messuages, &c. within the precincts of this manor, whereof the said Sir S. Helier died seised: or else the same would be seised by the lord of the said manor for want of a tenant. But nobody came who shewed any title to the same; therefore such default and this proclamation are recorded." Two other similar proclamations were made, at two subsequent courts, &c. By an entry on the rolls of a small court, and court baron holden in 1786, it appeared as follows:—"At this court a precept was issued by the steward of the manor, and delivered to W. B., bailiff and officer of the manor directing him to seise into the hands of the lord all and singular the several copyhold messuages, &c. which are situate and being in Featherstone, &c. of which Sir S. Helier died seised; and to return the precept at the next court to be holden on, &c." By another entry on the rolls it appeared as follows:—"At this

Roe v. Helier,
3 Term R. 162.

court W. B., bailiff of this manor, and officer of this court, returned the precept which issued and was delivered to him at the last court, holden for this manor, in every thing obeyed and executed; to wit, that he had taken actual possession of, and seised into the hands of the lord of the manor, all those copyholds, &c. whereof the said Sir S. Helier died seised, as by the said precept he was commanded." At a subsequent court, the lord of the manor granted the said copyhold premises to a stranger, his heirs and assigns for ever, according to the custom of the said manor, who was admitted tenant, paid the lord a fine of 69*l.*, and made his fealty. The heirs at law of Sir S. Helier did not apply to be admitted till the year 1788, when they were refused; and in consequence thereof brought their ejectment. A verdict was found for the plaintiffs, subject to the opinion of the Court on the above case.

After several arguments Lord Kenyon said,—“The first point made is on the supposed forfeiture, by reason of the heirs of Sir S. Helier neglecting to come to the lord's court, to be admitted as his tenants, and to satisfy the lord's claim of the fruits of his tenure. I cannot but observe, that the interest of the lord of this manor was not very deeply concerned in the heir's not coming in to be admitted, because it is stated that no fine was due on admission. The case does indeed state, that he had a minute interest, namely, a relief of 3*s.* 6*d.*: but however small this fruit of tenure was, the lord undoubtedly had a right to it, and to see, by the inspection of his court-rolls, who were his tenants. But the severity of the law in these, as in all other cases of forfeiture, warrants the courts in taking care that there is the greatest accuracy in the lord's proceeding. It is so in the case of outlawry, and all cases of criminal proceedings. Several cases were mentioned, which shew that a general forfeiture of a copyhold estate, for not coming in to be admitted, does not accrue, unless there be a custom to warrant it. In such cases the lord has only a right to enter into possession, to satisfy himself of the injury he sustains for the want of a tenant; he can only retain the possession *quousque*. It seemed almost, and would have been very properly admitted in the argument, that if the lord, having a right to seise *quousque*, did seise absolutely, there was a defect in the seisure which vitiated the whole. But it was contended that there was no defect in the seisure, for that the Court might pre-

sume, for any thing that appeared to the contrary, that the lord did only seise till a tenant came in to be admitted; and that *omnia presumuntur solemniter esse acta*: but I think, that sufficient appears in the case, to shew that the seisure was irregular. A seisure generally, and undefined, must necessarily be a seisure of the whole property; if it were not, what other line could be drawn? So an entry upon an estate generally, is an entry for the whole; and if it be for less, it should be so defined at the time. The case, however, does not rest on this observation; for we collect from subsequent acts of the lord, which are unambiguous, what his idea was when he did seise; for he made an absolute grant of the whole of this property to the defendant, his heirs and assigns for ever, taking a fine of 692*l.* for his admission. Then I am bound to say, that the lord entered as for an absolute forfeiture: and as this is a proceeding where the most strict regularity is necessary in all its parts, we are warranted in saying that here was no seisure binding on the parties."

The other judges concurring, judgment was given for the heirs of Sir S. Helier.

35. Where the custom requires that a person taking an estate in remainder shall come in and be admitted, the lord may seise *quousque* the tenant does come in. And the proclamations being in general terms, for any person to come in and make title, and the presentment of default being also general, are good; though the person in remainder be known, and named in the surrender.

Of a person in remainder.

36. In a modern case, which has been already stated, where a remainder-man refused to come in and be admitted, the custom requiring that persons in remainder should come in and be admitted; there was a presentment by the homage, that E. I., who was tenant for life, died seised; and three proclamations were made at three different courts, that if any person or persons would come into court, and make any just claim to the lands whereof the tenant for life died seised, such person should come into court and take admission to the same. No one coming to be admitted, a precept was issued by the steward of the manor, directed to the bailiff, authorizing him, in the presence of two or more copyhold tenants of the manor, to seise into the hands of the lord, *quousque* the tenant should come in to be admitted, all

Doe v. Jenney,
5 East. 522.

such copyhold lands, &c. to and for the use of the lord. The lands were accordingly seised by the bailiff, and the lord made a lease, and brought an ejectment.

It was objected, that the next tenant being known and named in the rolls, the proclamations and the presentment should have been against her by name.

Lord Ellenborough delivered the judgment of the Court. He said, the question was, whether the presentment that the tenant for life died seised, and the proclamations made, "that if any person would come into court and make just claim or title to the lands whereof E. I. died seised, such person should come into court and take admission of the same," was sufficient. No authority had been cited in support of this objection: but it rested wholly in what was said to be the usual practice in courts baron, of mentioning in the presentment and proclamations the name of the person, when known, who ought to come in and be admitted. If the tenant, when known, were likely to be prejudiced by not being named, this objection would have weight; and though, as the object of the presentment was for the information and instruction of the lord, it would, in respect of him, be better to mention the person who ought to come in and be admitted, when known; yet, in respect to the heir or remainderman, this was not the purpose of the presentment, nor were the proclamations intended to inform persons of their titles, but to give notice to those who had a right to be admitted, that the tenancy was vacant, and that the lord required of those who were entitled to take upon themselves the tenancy; and it seemed sufficient, so far as the tenant was concerned, if the presentment and proclamations were in the general terms used on this occasion. For these reasons, the Court thought there should be judgment for the lord.

*Clayton v.
Cooke,
2 Atk. 449.*

37. The lord of a manor cannot bring a bill in Chancery against a copyholder, to compel him to come in and be admitted tenant; for he has his remedy at law, by making proclamations so many court days. But if there be any confusion arising from copyhold land being blended together, the lord may bring a bill of discovery to ascertain the lands.

*Of a surren-
dersee.
King v. Dillis-
ton, 1 Show.
31. 83.*

38. A custom that the person to whose use a copyhold is surrendered shall, after three proclamations, come in and be admitted, or otherwise the lands shall be forfeited, is good. But in a case of this kind infancy will excuse.

39. It has been stated that copyholds are indirectly devisable. Of a devisee.
In such cases, the non-appearance of a devisee to be admitted operates in general as a forfeiture of the copyhold.

40. A copyhold was devised to six persons upon certain trusts: one offered to be admitted and to pay his proportion of the fine, which the lord refused, unless he would pay the whole: the other five declined the trust. The lord, after three proclamations for the six trustees to come in and be admitted, seised for the forfeiture. The Court held, that the lord ought to have admitted the person who offered himself; and then he might have proceeded to recover his fine from the six devisees, if it was due either by law, or the custom of the manor; and that he had been too hasty in entering for a supposed forfeiture before admittance. A seisure *quousque* was till somebody came to be admitted; so that it was clear the lord had no right to seise. Roe v. Hutton,
2 Wils. 162.

41. All persons of sufficient understanding may forfeit a copyhold; but a person of nonsane memory, an idiot, or a lunatic, are unable to forfeit. So an infant under the age of fourteen, because he wants discretion: but an infant at the age of discretion may forfeit his copyhold, not by offences proceeding from negligence or ignorance, but by such as proceed from contempt. Who may forfeit.
Co. Cop. a. 59.

42. A married woman cannot, by any act of her own, forfeit her copyhold; because she is not *sui juris*, *sed sub potestate viri*. But she may, by an act done by her husband, incur a forfeiture. And it was resolved in 27 Eliz. that where a woman, tenant for life of a copyhold, takes a husband, who commits waste and dies, the estate of the wife is forfeited. Idem.
4 Rep. 27. a.
Gilb. Ten. 243.

43. By the statute 11 Geo. 4. and 1 Will. 4. (which repeals the 9 Geo. 1. c. 29. s. 5.) it is enacted, that no infant, fême covert or lunatic shall forfeit any copyhold land, for his or her neglect or refusal to come to any court to be kept for any manor, whereof such land is parcel, and to be admitted thereto; nor for the omission, denial, or refusal of any such infant, fême covert or lunatic, to pay any fine imposed or set on his or her admittance. And by the tenth section it is provided, that if the fine imposed in any of the cases thereinbefore mentioned shall not be warranted by the custom of the manor, or shall be unlawful, then such infant, fême covert or lunatic shall be at liberty to controvert the legality of such fine. Vid. *supra*, s. 45.

Kensington v. Mansell,
13 Ves. 240.

44. This statute is confined to the cases expressed in it; namely, title by descent, or surrender to the use of a will; and does not extend to a title derived from a deed.

Doe v. Hefner,
3 Term R. 162.

45. It was resolved in a modern case, that if one of several coheirs of a copyholder be a feme covert, and the lord seises the whole estate, in default of the heirs not coming in to be admitted, after three proclamations, without first appointing a guardian for the feme covert, according to this act, a seisure of the whole estate is irregular; though it was not known to the lord that one of the heirs was a feme covert.

Extent of forfeiture.
Taverner v. Cromwell,
4 Rep. 27. a.
Gilb. Ten. 217.

46. A forfeiture, in general, only extends to the copyhold in which the act has been done. For if a copyholder be seised of Black Acre, White Acre, and Green Acre, by several copies, and commits waste in Black Acre, it is thereby forfeited. But there is no forfeiture of White Acre or Green Acre.

Fuller v. Terry,
6 Vin. Ab. 146.
Gilb. Ten. 217.
246.

47. If a copyholder makes a feoffment of one acre of his copyhold, all is not forfeited, but only that acre. But if a copyholder cuts down a tree which grows upon an acre of land, parcel of the copyhold, this is a forfeiture of all the copyhold, because the trees are to be employed in building and reparation of the houses; and therefore by the doing of waste all the copyhold is impaired.

Where presentment is necessary.
Co. Cop. ss. 57. 58.
Gilb. Ten. 246.

48. Some acts amount to a forfeiture, the moment they are committed: others are not forfeitures till they are presented by the homage, in the lord's court. Offences which are apparent and notorious, of which the lord, by common presumption, cannot choose but have notice, are forfeitures immediately. But presentment by the homage is necessary in those cases where the lord cannot be presumed to have notice of himself; as where the tenant is convicted of treason or felony, or makes an alienation contrary to the custom.

Ante, s. 8.

49. It was, however, resolved in the case of *East v. Harding*, where a copyholder incurred a forfeiture by making a lease, that presentment was not absolutely necessary, but only for the lord's better instruction of his title, that the lord may take advantage of a forfeiture before presentment. But Lord Chief Baron Gilbert says, it is safer to get all forfeitures presented; and if there be a particular custom, it must be pursued.

Ten. 246.

What dispenses with a forfeiture.
Co. Cop. s. 61.

50. Forfeitures may, in many cases, be dispensed with by the lord. Thus, if a copyholder has broken the customs of the manor, by committing waste, refusing to perform his services, or to

pay his rent, the forfeitures arising from these acts may be dispensed with by a subsequent acceptance of rent, or other act by which the lord acknowledges the copyholder to be his tenant. But where the lord is ignorant of the act by which a copyhold is forfeited, nothing done by him will operate as a dispensation of the forfeiture. And it seems that if the lord accepts a surrender from a tenant who has committed a forfeiture, this is no dispensation or bar to the entry of the lord; if the cause of forfeiture be such that the lord might well be supposed ignorant of, otherwise not, as making a private lease. But for failure of suit of Court, nonpayment of rent, and the like, it is otherwise, because he cannot be presumed ignorant of these.

6 Vin. Ab. 149.
Pl. 14.

51. If a copyholder commits a forfeiture, and the lord *pro tempore*, having a legal title, grants an admittance, it will operate as a dispensation of the forfeiture, not only as to himself, but as to the person in reversion; for such a new grant and admittance amounts to an entry for the forfeiture, and a new grant. But a lord by wrong cannot by such an admittance purge the forfeiture, so as to bind the rightful lord.

Milfax v. Baker,
1 Lev. 26.

52. A copyholder cut timber, sold it, and died; the succeeding lord brought an ejectment against the heir, who pleaded, that in trespass brought by him, the lord (now plaintiff,) justified for taking a heriot. The Court said, that justification for heriot service on seisin of the ancestor was an acceptance of the heir as tenant, and purged the forfeiture.

Pascal v. Wood,
3 Keb. 641.

Gilb. Ten. 247.

53. It was said in this last case, that where there is an actual entry by the lord in the lifetime of the copyholder, for a forfeiture by him, no acceptance after will purge the forfeiture. And though it never was presented by the homage, that was not material, it being a thing notorious.

54. Lord Coke says, some make this difference, that those forfeitures only which destroy not the copyhold are confirmable by subsequent acknowledgment, and not those forfeitures which tend to the destruction of a copyhold. As if the copyholder makes a feoffment, by this the copyhold is destroyed; therefore no subsequent acknowledgment of the lord will confirm it. And in the Supplement to Lord Coke's Copyhold, it is said, that if a copyholder levies a fine, makes a feoffment, or suffers a common recovery, which destroy the estate, no acceptance of rent, or act done by the lord, will be available to make the estate

Co. Cop. s. 61.
Gilb. Ten. 334.

s. 11.

good. But where the custom of the manor only is broken, as if the copyholder makes a long lease, or refuses to pay his rent, or to be sworn of the homage, or commits waste, there his estate may be afterwards confirmed.

Doe v. Helier,
3 Term R. 162.

55. This doctrine has been denied in a modern case, in which it was held, that a forfeiture by a copyholder's levying a fine might be waived by the lord. In that case the lord suffered many years to elapse without taking advantage of the forfeiture, and by several solemn acts in his court recognised the person who levied the fine as his tenant. It was first presented that he died seised; then the lord required the heir to come in and be admitted. These, said Lord Kenyon, were as solemn acts of recognition, as the admittance of the copyholder in *Milfax v. Baker*; and he did not think he was straining that case in saying, that any act equally solemn on the part of the lord was sufficient to preclude him from taking advantage of the forfeiture.

Ante, s. 51.

Who may take
advantage of a
forfeiture.
Co. Cop. s. 60.
6 Vin. Ab. 141.

56. The lord of the manor is, in general, the only person who can take advantage of the forfeiture of a copyhold. And even a lessee for years shall take advantage of a forfeiture, for he is *dominus pro tempore*.

Idem.
East v.
Harding.

57. If there be a lord of a manor, in which there are copyholders, and the lord grants to a stranger the freehold of a copyhold, in fee; though by this the tenement is divided from the manor, and not demisable by copy again; yet the grantee of the freehold shall take advantage of a forfeiture, committed after, by the copyholder, for he ought to pay his rent to the grantee. So in this case, if the grantee of the freehold makes a lease for years of the freehold, this lessee for years shall take advantage of a forfeiture committed after by the copyholder, because he was *dominus pro tempore*.

9 Rep. 107 a.
Duke of York
v. Marham,
Hard. 432.

58. In all cases of forfeiture for treason or felony by a copyholder, the lord becomes entitled to the copyhold, and not the king, unless there be a special act of parliament for that purpose. And where by the statute 12 Cha. 2. all the lands, tenements, and hereditaments of the regicides were forfeited to the Crown, Lord Hale held that copyholds were not included; for if a copyhold was forfeited by this act to the Crown, it would be thereby destroyed, and pass by letters patent, not by surrender.

Where equity
relieves.

59. There have been several cases in which the Court of

Chancery has interposed, to moderate the rigour of copyhold customs, and to relieve against unreasonable forfeitures.

60. A copyholder for life had committed a forfeiture, by cutting down timber trees, which was found so by a trial, and verdict at law; the lord entered and admitted the defendant, who was the remainder-man. The copyholder exhibited his bill to be relieved against the forfeiture, offering, if it should appear to be waste, to make satisfaction. An issue was directed to try whether it was the primary intention of the copyholder, in cutting down the timber, to commit waste. It being found for the plaintiff, it was decreed that he should be relieved; and that the defendant, the remainder-man, should deliver up the possession to the plaintiff, and account for the mesne profit.

Thomas v. Porter,
1 Cha. Ca. 95.

61. A person having two copyholds held of the same manor, cut down timber in the one, and employed it in repairing the other, pretending that he was authorized by the custom of the manor; the timber being assigned and set out by two of the customary tenants. An ejectment was brought by the lord, upon the supposition that this was voluntary waste, and consequently a forfeiture. Upon the first trial a verdict was given against the lord: but upon a new trial the jury found against the custom. A bill was then brought in Chancery to be relieved against the forfeiture. It was admitted that by the custom, when timber was wanting on one copyhold tenement, the lord, by his woodman or bailiff, might assign timber for repairs on any of the other copyhold estates: but here a custom was set up for two tenants to assign to a third, which might be prejudicial to the lord; as more timber might by that means be cut than was necessary, and thriving timber, when there might be found enough of that which was decaying, fit for repairs. It was, however, admitted that the timber was of small value, and all of it employed in the repairs of the copyhold.

Nash v. Earl of Derby,
2 Vern. 537.

The Lord Keeper relieved the plaintiff against the forfeiture: but decreed him to pay the costs of both the trials at law and the costs of this suit.

62. In a subsequent case the Court of Chancery relieved a Quaker against a forfeiture which he had incurred by not doing suit and service at the lord's court.

Cudmore v. Raven,
2 Vern. 664.

63. A Court of Equity will not, however, interpose in cases

Where relief has been refused.

of this kind, unless there are equitable circumstances which entitle the party who committed the forfeiture to relief.

Cox v. Higford,
1 Ab. Eq. 121.

64. The plaintiff brought his bill to be relieved against the forfeiture of his copyhold estate. It appeared that he had been guilty of the greatest disobedience possible to his lord; that after six several presentments to repair, and an entry by the lord for the forfeiture, he brought an ejectment; and when upon the trial, a rule was entered into by consent, that upon payment of 4*l.* to the lord for his costs, which was not a fourth part of the costs to which he had put the lord, and putting the estate into repair, he should be admitted to it again; yet he never complied with the rule, nor made any offer of costs to the lord, but instead of that brought another ejectment, and was non-suited; and after nine or ten years more, brought his bill.

Upon these circumstances the Lord Keeper declared he ought to have no relief, or if he were to be relieved, yet it must be upon payment to the lord of all his costs, and putting the estate into good repair; which would amount to more than his interest was worth, having only an estate for life; and dismissed the bill, but without costs. The Lord Keeper likewise declared, that though this were a voluntary waste and forfeiture, against which it was objected that the court never gave relief, yet he thought the rules of equity not so strict, but that relief might be given, even against voluntary waste and forfeiture.

Peachey v.
Somerset,
Prec. in Cha.
568.
2 Ab. Eq. 227.

65. A copyholder made leases not warranted by the custom of the manor, and worked a quarry of stone from his freehold lands into the copyhold, without licence. Afterwards his son cut down trees, and inclosed some of the copyhold lands, notwithstanding several repeated admonitions from the lord; who brought his ejectment, and had a verdict as for a forfeiture.

On a bill brought for relief, Lord Macclesfield was clear of opinion that there was no foundation for equity to interpose. That it would be to alter the nature of the tenure whereby copyholds subsisted. That if this was a forfeiture at law, a Court of Equity had nothing to do with it; and that it was like the case of a feoffment or fine levied by a particular tenant, against which there could be no relief. That copyholders were but tenants at will, though it were according to the custom of the manor. That this entirely differed from the case of a forfeiture for non-payment

of rent or of a fine; for there the estate was in the nature of a security for those sums, and the lord might be recompensed in damages and costs. That making a lease for years was a forfeiture, as it was a determination of his will: and though the lord should refuse to grant a licence, yet the tenant had no remedy, nor would the court compel the lord to grant such licence. That though those copyholds were mended by time, and were in the nature of an inheritance, yet still the tenant was obliged to observe the law and custom to which they were subject. That these customs were in the nature of the limitations of an estate, which determined on the breach of them: and that unless there were some equitable circumstances in the case, the court could not interpose, as that would be to repeal and destroy the law.

CHAP. VI.

*Extinguishment and Suspension of Copyholds.*SECT. 2. *Surrender to the Lord.*8. *Release to the Lord.*10. *Conveyance by the Lord to the Copyholder.*13. *Enfranchisement.*SECT. 20. *Escheat or Forfeiture.*21. *When the Lands cease to be demisable.*22. *Suspension of Copyholds.*

SECTION I.

COPYHOLD estates may be destroyed in several ways; for whenever an estate of this kind ceases to be held by copy of court roll, according to the custom of the manor, it is said to be extinguished and gone.

Surrender to
the lord.

2. Thus if a copyholder surrenders his estate to the lord, to the use of the lord, the copyhold is thereby extinguished. It is however necessary, in a case of this kind, that the lord, to whom the surrender is made, have a lawful estate in the manor; for a surrender by a copyholder to a person who is possessed of the manor by wrong, will not operate as an extinguishment of the copyhold.

Pitt v. Moore,
2 Show. 156.

3. A bishop having been disseised of a manor during Cromwell's usurpation, a copyholder surrendered to the disseisor, *ut inde faciat voluntatem suam*. After the Restoration, the bishop entered. Resolved, that the copyhold was not extinguished, because the surrender was void.

Ten. 254.

4. Lord Ch. B. Gilbert says, if a surrender be made to the lord, expressing no use, it shall be to the use of the lord; for it cannot be imagined that the surrender was made to no end or purpose; and a surrender may be made to the lord, and no use

need be expressed: It is said in Comyn's Digest, Tit. Copyhold, F. 8. that in such a case the lord shall have it to the use of the surrenderor. But it is laid down by Lord Holt, that if a copyholder surrenders to the lord, without declaring an use, the copyhold extinguishes; as on a surrender by tenant for life, to him in reversion.

1 P. Wms. 17.
Ld. Raym. 627.

5. Where a copyhold is thus surrendered to the lord, the land continues to be part of the demesnes of the manor, freed from that customary right of occupation which the copyholder had in it, and will pass by any conveyance of the manor.

6. Thus it was resolved, in a modern case, that if a lord of a manor mortgage the manor in fee to A. and afterwards purchase copyholds, held of the manor, and take surrenders of them to himself in fee, they shall enure to the benefit of the mortgagee. And a settlement by the lord of all his estate mortgaged to A. shall pass the equity of redemption of such surrendered copyholds.

Doe v. Pott,
Doug. R. 709.

7. In a subsequent case it was held by Lord Eldon, that where the lord of a manor was tenant for life, with remainders over, and purchased a copyhold held of the manor, taking the surrender to him and his heirs, it was extinguished, and as parcel of the manor became subject to the limitations of it.

St. Paul v.
Dudley & Ward,
15 Ves. 167.
Vide, c. 1. s. 16.
supra.

8. If a copyholder releases all his estate and interest to the lord of the manor, it will operate as an extinguishment of his copyhold. For although a release cannot in its own nature pass away a possession, yet it may amount to a signification of the tenant's intention to hold the lands no longer; and the rule is, that every thing amounting to a determination of the copyholder's will, to hold no longer, extinguishes the copyhold.

Release to the
lord.
Gilb. Ten. 300.
Hut. R. 65.
W. Jones, 42.

9. So if the lord conveys away the freehold of a copyhold to a stranger, and the copyholder releases to the stranger, this will also extinguish the copyhold. But if a copyholder be ousted, and so the lord disseised, and the copyholder releases all his right to the disseisor, it will have no effect; because the disseisor has no customary estate on which the release of the customary right may enure.

Wakeford's
case,
1 Leon. 102.
Wilson v. Allen,
1 Jac. & Walk.
611.
Mortimer's
case,
Hutl. 150.
Gilb. Ten. 300.

10. Any conveyance of the land by the lord to the copyholder, for an estate of freehold, or even for a term of years, will extinguish the copyhold. For the estate of the copyholder being

Conveyance by
the lord to the
copyholder.
Co. Cop. s. 62

only at will, becomes merged by the accession of any greater estate.

Lane's case,
2 Rep. 16. b.

11. If the lord demises land, held by copy, to a stranger for years, and the stranger assigns over his term to the copyholder, the copyhold will be thereby extinguished; for both these interests cannot exist in the same person, *simul et semel*; and consequently one of them must be determined, which of necessity must be the customary estate; for the estate derived from the common law cannot merge in that; and when common law and custom come together, and one or the other must necessarily stand, the common law shall be preferred.

Hide v. Newport, Moo. 185.
4 Rep. 31. b.

12. It was resolved upon the same principle, that where a copyholder in fee took a lease for years of the manor, the copyhold was extinct for ever, and not during the continuance of the lease only.

Enfranchisement.

13. The next mode of extinguishing a copyhold is by enfranchisement, by which the tenure is changed from base to free. This may be done by the lord's releasing to the copyholder his seignorial rights and services, by which the tenure is extinguished. For as the copyholder was tenant at will to the lord, by which there was a privity of estate between them, the release enlarges the copyholder's estate, and gives him the freehold.

Tit. 32. c. 6.

14. It is the same where the lord ratifies and confirms the customary estate to the tenant, and grants that he shall be free from all customs and services, due in respect of such tenancy.

Doe v. Huntington,
4 East. 271.

15. Upon a question whether lands were freehold or customary, it appeared that they had originally been customary, or tenant right estates, holden of a manor in Cumberland, by the payment of certain ancient customary rents and other services; and descendible from ancestor to heir: that the lord of the manor, by an indenture made in 24 Cha. 2., in consideration of 61 years' rent, ratified and confirmed to the then tenant and his heirs all his customary and tenant right estate, with the appurtenances, &c., and granted, that the tenant and his heirs should be freed, acquitted, exempted, and discharged from the payment of all rents, fines, heriots, &c. dues, customs, services, and demands, at any time thereafter happening to become due in respect of the tenancy, except one penny yearly rent; and also excepting and reserving suit of court, with the services incident thereto; and

saving and reserving all royalties, escheats, and forfeitures, and all other advantages and emoluments belonging to the seigniori, so as not to prejudice the immunities thereby granted to the tenant; and also granted liberty to cut timber, and to sell or lease, &c. without licence.

Lord Ellenborough delivered the judgment of the court. He said, that assuming these estates to have been holden prior to the deed of 24 Cha. 2. by copy of court roll, within the enlarged sense of those words, as they occurred in the stat. 12 Cha. 2. the court was of opinion that, by virtue of the deed of 24 Cha. 2. operating upon that species of tenure, the tenement in question was become frank fee; or, in other words, land holden in free and common socage. To confirm to the tenant his customary and tenant right estate, freed, acquitted, and discharged from the payment of all rents and services, &c. except the one penny rent which was reserved or retained out of the old rent, was tantamount to a release of those rents, services, &c. which were not so specifically exempted and restrained: for “where words are equivalent in substance to words of release, the law takes them as a release;” and “where there are words of substance, the law appoints how they shall enure;” taking these words of acquittance, exemption, and discharge, on the part of the lord, as operating in substance a release of the services specified, and assuming that there was no material difference between the tenure in question, and that of ancient demesne. For this purpose, there were several cases in point, to shew that the customary qualities of this tenure were extinguished by the deed.

Vide ante, c. 1.

Plowd. 140.

Roe v. Ireland,
11 East, 280.

16. When a copyhold is enfranchised either by a release of the services, or a conveyance of the freehold to the copyholder, the lands are severed from the manor; and in consequence of the statute *Quia Emptores*, will afterwards be held of the next immediate lord. Nor can the lord of a manor, upon an enfranchisement, reserve to himself the ancient rents and services.

17. In an action of debt to recover 2s. 6d., in which sum the defendant was amerced for not attending a court baron; it appeared that the defendant was seised of fourteen acres of land, which had formerly been held of the manor, whereof the plaintiff was lord, by copy of court roll; but that in 18 Ja. 1. the then

Bradshaw v. Lawson,
4 Term R. 443.

lord of the manor made a feoffment of the land to the then copyholder, reserving a yearly rent, which was stated in the deed to be the ancient yearly rent, for all manner of suits, services, and demands whatsoever. The question was, whether the owner of this land was bound to attend the plaintiff's court.

Lord Kenyon observed, that the principal question was settled by the statute *Quia Emptores*, 18 Edw. 1.; for after that statute, the lord could not by any deed reserve the old services, when he conveyed away the estate in respect of which those services were due, as the tenant must hold of the superior lord. By the conveyance, the estate was no longer parcel of the manor, nor held of the manor; neither was the defendant's ancestor any longer a tenant of the manor; therefore it was clear that the defendant was not bound to attend the plaintiff's court, as a tenant of the manor.

Ante, c. 1. s. 45.
Stat. 12 Geo. 3.
c. 35.
Wilson v. Allen,
1 Jac. & Walk.
611.

18. The lord of a manor who enfranchises a copyhold, must either be seised in fee simple, or have a power to convey the fee simple of the lands to the copyholder.

Wynne v.
Cookes,
1 Bro.C.C. 515.
2d ed.

19. Although a copyholder should only have a particular estate in his copyhold, yet he may take an enfranchisement, which will be deemed absolute. But in a case of this kind, the enfranchisement shall be for the benefit of the persons in remainder, who would have taken the copyhold interest, in case there had not been an enfranchisement: a court of equity will accordingly direct a conveyance from the heirs at law of the particular tenant, to the persons in remainder, on their paying a proportionate part of the consideration given for the enfranchisement.

Escheat or for-
feiture.
Ante, c. 1.

20. Where copyholds come to the lord by escheat or forfeiture, the tenure is extinguished. But it has been stated that in cases of this kind the lord may grant them out again by copy of court roll.

When the lands
cease to be
demisable.

21. It has also been stated that whenever lands which had been held by copy of court roll have ceased to be demised or demisable by copy, they can never be granted again by that tenure, and consequently the copyhold is thereby extinct.

Suspension of
copyholds.
Doe v. Pyke,
5 Mau. & Sel.
146. 155.

22. There are several cases in which copyholds are suspended only for a certain time, and not absolutely extinguished. Thus it is said that where a person, holding a copyhold, becomes

king, the copyhold is suspended; for it would be beneath the dignity of a king to perform such services as those to which copyholders are subject. But after the decease of the king, the next person who becomes entitled to it, if a subject, shall hold by copy.

23. Where a copyholder married the lady of the manor, it was held that this operated as a suspension of the copyhold, during the marriage only; and was not an extinguishment.

Co. Cop. s. 62.
Anon.
Cro. Eliz. s.

TITLE XI.

U S E.

CHAP. I.

Origin of Uses.

CHAP. II.

Nature of a Use before the Statute 27 Hen. 8.

CHAP. III.

Statute 27 Hen. 8. of Uses.

CHAP. IV.

Modern Doctrine of Uses.

CHAP. I.

*Origin of Uses.*SECT. 1. *Origin of Uses.*5. *Derived from the Fidei Commissum.*SECT. 11. *Jurisdiction of the Chancellors over Uses.*13. *Introduction of the Writ of Subpana.*

SECTION I.

Origin of Uses. HAVING treated of legal and customary estates, we now come to discuss the nature and properties of what are called Equitable Estates.

The original simplicity of the common law admitted of no immediate estate in lands, which was not clothed with the legal seisin and possession. But in process of time a right to the rents and profits of lands, whereof another person had the legal seisin and possession, was introduced; and though not recognised for a long time by the courts of common law, was, notwith-

standing, supported by the Court of Chancery, and became well known by the name of a use.

2. The introduction of this novelty has been attended with the most important consequences; for though at first it appears to have been but a trivial innovation, yet in its progress it has in fact produced a revolution in the system of real property, and has introduced a mode of transferring land very different from that which the old law had originally established; for the doctrine of uses is become the foundation of the modern system of conveyancing.

3. A use was created in the following manner;—the owner of a real estate conveyed it by feoffment, with livery of seisin to some friend, with a secret agreement that the feoffee should be seised of the lands to the use of the feoffor, or of a third person. Thus the legal seisin was in one, and the use or right to the rents and profits was in another.

4. It would be a matter of considerable difficulty to ascertain the precise time when this distinction between the legal seisin and the right to the rents and profits was first introduced. It is, however, certain, that the practice of conveying lands to one person, to the use of another, did not become general till the reign of King Edward III. when the ecclesiastics adopted it, in order to evade the statutes of Mortmain, by procuring conveyances of lands to be made, not directly to themselves but to some lay persons; with a secret agreement that they should hold the lands for the use of the ecclesiastics, and permit them to take the rents and profits.

5. The idea of a use, and the rules by which it was first regulated, are now generally admitted to have been borrowed by the ecclesiastics from the *Fidei Commissum* of the civil law, of which it will therefore be necessary to give some account.

6. By the Roman law a great number of persons were incapable of being constituted heirs, or even of taking a legacy under the testament of a Roman citizen; such as exiles, unmarried persons, those who had no children, &c. In order to evade this law, it became usual for testators to constitute some person to be their heir, who was capable of taking the inheritance; and to annex a request to the devise, that the person thus constituted heir should give the property to some other person, who was incapable of taking directly under the will. *Quibus enim non pote-*

Bac. Read.
Ed. 1785. 22.
1 Rep. 123. a.

Derived from
the *Fidei Com-*
missum.
Bac. Read. 19.

Vinnius. ad
Instit. Lib. 2.
Tit. 23. s. 1.

Just. Inst.
Lib. 2. Tit. 23.
s. 1.

runt hereditatem vel legata relinquere, si relinquebant, fidei committebant eorum qui capere ex testamento poterant.

Id. s. 2.

7. This was called a *Fidei Commissum*, of which the form is preserved in Justinian's Institute.—*Cum igitur aliquis scripserit, Lucius Titius Hæres esto; potest adjicere, Rogo te Luci Titi, ut cum primum poteris hereditatem meam adire, eam Caio Scio reddas restituas.* And in cases of this kind the person thus constituted heir was called *Hæres Fiduciarius*, and the person to whom the testator directed the inheritance to be given was called *Hæres Fidei-commissarius*.

8. The *Hæres Fidei-commissarius* had only what the Roman lawyers called a *Jus Precarium*, that is a right in curtesy, for which the remedy was only by intreaty or request: so that the *hæres fiduciarius* was under no legal obligation of complying with the request of the testator.—*Sciendum itaque est omnia fidei commissa primis temporibus infirma fuisse; quia nemo invito cogebatur præstare id de quo rogatus erat. Et ideo fidei commissa appellata sunt, quia nullo vinculo juris, sed tantum pudore eorum qui rogabantur, continebantur.*

*Just. Inst.
Lib. 2. Tit. 23.
s. 2.*

9. Thus stood the Roman law respecting the *Fidei commissum* for some centuries, during which several frauds were committed by those who, being constituted heirs, with a direction to give the inheritance to some other person, refused to execute the trust reposed in them by the testator, and converted the property to their own use. This induced the Emperor Augustus to direct the consuls to take cognisance of all future cases of this kind.—*Postea Divus Augustus Primus, semel iterumque gratiâ personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere. Quod quia justum videbatur, et populare erat, paulatim conversum est in assiduam jurisdictionem; tantusque eorum favor factus est, ut paulatim etiam Prætor crearetur, qui de Fidei commissis jus diceret, quem Fidei commissarium appellabant.*

Id. s. 12.

10. The Emperor Justinian completed this system, and extended the rights of the *Hæres Fidei commissarius* by a law which enacted, that if a testator should direct the person whom he instituted his heir to give either the whole, or a part of the inheritance, to another, and this circumstance could not be proved, either by the written will of the testator, or the testimony of five witnesses, in case the person instituted heir should refuse to

comply with the intentions of the testator, he was compellable either to take a solemn oath that the testator had not created *any fidei commissum*, or else to execute the trust reposed in him.

11. Upon the first introduction of uses (a) into the English law, the person to whom a use was limited, who was called the *Cestui que use*, was exactly in the same situation with the *Heres Fidei commissarius*; and depended entirely on the good faith of the feoffees to uses, or the persons to whom the lands were conveyed. And it is natural to suppose, that while the rights of the *cestui que use* were so extremely precarious, and depended so entirely on the good faith of the feoffee to uses, many breaches of trust were committed. Nor is it improbable but that even the ecclesiastics, who first introduced this species of property, became, in some instances, the dupes of those to whom lands had been conveyed for their use. This induced the clerical chancellors of those times to consider the limitation of a use as similar to a *fidei commissum*, and binding in conscience: they, therefore assumed the jurisdiction which the Emperor Augustus had given to the Roman consuls, of compelling the execution of uses in the Court of Chancery.

Jurisdiction of the Chancellors over uses.

12. It however soon appeared that even this assumed jurisdiction was not sufficient to answer their purpose; for whenever a positive declaration of a use could not be proved, which must frequently have happened, when uses were declared in a secret manner, by words only, without writing, the Court of Chancery could not compel the feoffees to uses to execute them, there being no legal proof that they held the lands to the use of any other persons.

13. To remedy this inconvenience, John Waltham, Bishop of Salisbury, and Chancellor to King Richard II. took advantage of the privilege given him by the Statute of Westminster 2, 13 Edw. 1. c. 34. of devising new writs; and invented a new writ of subpoena, returnable only into the Court of Chancery, which was used there for the same purpose as a citation in the courts of civil and canon law, to compel the appearance of a defendant, and to oblige him to answer upon oath the allegations of the plaintiff, contrary to one of the first principles of the common law, that no man can be compelled to charge himself.

Invention of the writ of Subpoena.

14. It is well known how averse the English nation always

(a) [As to the introduction of Uses, see 2 Bl. C. 327, 15 ed.]

Rot. Parl.
Vol. III. 471.

was from any alteration of their ancient customs, and that they were particularly jealous of every maxim or rule taken from the civilians or canonists, which was attempted to be introduced or substituted in the room of the common law. Accordingly we find that this innovation did not pass unnoticed. For early in the next reign, namely, in 2 Hen. IV. the Commons took notice of this writ of *subpœna*, and presented a strong petition to the king against it, praying that it might be abolished; to which Henry, who was not then firmly settled on the throne, gave a palliating answer.

Rot. Parl.
Vol. IV. 84.

15. Another petition was presented by the Commons to King Henry V., complaining of the hardships to which all persons were become liable, from the introduction of this new writ of *subpœna*; observing that it was a novelty, against the form of the common law, which John Waltham, late Bishop of Salisbury, out of his subtilty found out and begun, by which persons were compelled to answer upon oath, pursuant to the form of the civil law, and the law of the holy church; praying that those who sued out such a writ should insert in it all their allegations. And that if any person was aggrieved by a writ of this kind, in any matter which was determinable at common law, he should be paid the sum of 40*l*. To this the king returned an answer in the negative; by which this writ of *subpœna* became firmly established; and was thenceforth constantly used for the purpose of compelling all persons to declare on oath whether they held particular lands to their own use, or to the use of others.

16. From this account of the progress of uses, it evidently appears that the ecclesiastical chancellors adopted the principles of the civil law in the support of them; and that the Bishop of Salisbury derived the idea of the writ of *subpœna*, returnable into Chancery, from that law of Justinian, which has been mentioned in the preceding part of this chapter.

17. Notwithstanding the invention of the writ of *subpœna*, it appears that the Court of Chancery did not immediately possess itself of that absolute jurisdiction over persons enfeoffed to uses, which it afterwards exercised. For in the Rolls of Parliament, 9 Hen. 5. there is a petition from William Lord Clynton, stating, that upon his going on an expedition to Ireland, he had enfeoffed William de la Poole of all his lands, for the performance of his will, which the said Poole refused to perform; and prayed remedy.

Vol. IV. 151.

When, upon full proof of the surmise aforesaid, it was enacted, Poole being present, that he should re-enfeoff the said lord, or whom he would, and their heirs for ever, discharged of all incumbrances done by the said Poole; the which Poole did in open parliament, in two deeds, there enrolled.

18. The abuses arising from the writ of *subpæna* were in some degree restrained by the statute 15 Hen. 6. c. 4. which, after reciting—"That divers persons had been greatly vexed and grieved by writs of *subpæna*, purchased for matters determinable by the common law of the land, to the great damage of such persons so vexed, and in subversion and impediment of the common law:" It was enacted that no writ of *subpæna* should be granted, until surety was found to satisfy the party so grieved and vexed for his damages and expenses, if the matter could not be made good which was contained in the bill.

CHAP. II.

Nature of a Use before the Statute 27 Hen. 8.

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| <p>1. <i>A Use was a Right in Conscience only.</i></p> <p>8. <i>Founded on confidence in the Person.</i></p> <p>12. <i>And Privy of Estate.</i></p> <p>15. <i>Who might be seized to Uses.</i></p> <p>19. <i>What might be conveyed to Uses.</i></p> <p>20. <i>Rules by which Uses were governed.</i></p> <p>21. <i>Could not be raised without Consideration.</i></p> <p>22. <i>Not an object of Tenure.</i></p> <p>24. <i>Not subject to Forfeiture.</i></p> <p>26. <i>Not extendible on Assets.</i></p> <p>27. <i>Not subject to Curtesy or Dower.</i></p> | <p>28. <i>Uses were alienable.</i></p> <p>32. <i>Without Words of Limitation.</i></p> <p>33. <i>Might commence in futuro.</i></p> <p>34. <i>Might be revoked.</i></p> <p>35. <i>And change by matter subsequent.</i></p> <p>36. <i>Were devisable.</i></p> <p>38. <i>And descendible.</i></p> <p>40. <i>Inconveniences of Uses.</i></p> <p>41. <i>Statutes made to remedy them.</i></p> <p>45. <i>[Distinction between Uses and Trusts before the stat. 27 Hen. 8. c. 10.]</i></p> |
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SECTION I.

A use was a right in conscience only.
Read. 6.

LORD BACON, in his justly celebrated Reading on the Statute of Uses, observes, that it is the nature of all human science and knowledge to proceed most safely by negative and exclusive, to what is affirmative and inclusive; and then says,—"An use is no right, title, or interest in law." Neither *jus in re*, nor *ad rem*, that is, neither an estate nor a demand; so that it was nothing for which a remedy was given by the course of the common law, being a species of property totally unknown to it, and for which it was therefore impossible that it should have made any provision.

1 Rep. 140. a.

2. Lord Bacon then proceeds to state affirmatively what a use is; and after giving the definition of a use from Plowden, 352. namely, that a use is a trust reposed by any person in the tenant, that he may suffer him to take the profits, and that he

will perform his intent, he says, *Usus est dominium fiduciarium*, Use is an ownership in trust, so that *usus et status, sive possessio, potius differunt secundum rationem fori, quam secundum naturam rei*; for that one of them is in court of law, the other in court of conscience.

3. The reason why the *cestui que use* had no property whatever, by the common law, in the lands given to his use, was, because where lands were legally conveyed to one person to the use of another, the limitation of the use was deemed absolutely void; as it only derived its effect from the declaration of the feoffor; whereas no legal right to a freehold estate in lands could be transferred, without the ceremony of livery of seisin.

4. Thus in a case mentioned in the Year Books, where A. 4 Edw. 4. 3. enfeoffed B. to the use of himself, the judges observe, that in Chancery a man shall have his remedy according to conscience; but in the Common Pleas and the King's Bench it was otherwise; for the feoffee should have the land, and the feoffor should have nothing against his own feoffment, though it was only upon confidence. And it is said in Plowden 349. that by the common law *cestui que use* could not enter upon the land: but if he had entered, the feoffees might have an action of trespass against him, and punish him; for the land as fully belonged to the feoffees, as if there had been no use of it; so that if the feoffees had ousted the *cestui que use*, or had sued him for taking the profits, he would not have any answer or defence at the common law, but was driven to seek his remedy in a court of conscience.

5. Although the *cestui que use* was generally in possession of 1 Rep. 140. a. the lands, yet he was only considered, by the courts of common law, as tenant at sufferance; his title to the land was of so low and precarious a nature, that he could not even justify the seizing of cattle for trespass. And if he made a lease, the lessee might plead that he had nothing in the land.

6. When the Court of Chancery first assumed a jurisdiction in cases of uses, it went no farther than to compel payment of the rents and profits to the *cestui que use*. In process of time it proceeded another step; and established it as a rule that the *cestui que use* had a right to call on the feoffees to uses for a conveyance of the legal estate, to himself, or to any other person whom he chose to appoint; and also to compel him to

Read. 10.

defend the title to the land. Hence Lord Bacon has said that a use consists of three parts:—"The first, that the feoffee will suffer the feoffor to take the profits; the second, that the feoffee, upon the request of the feoffor, or notice of his will, will execute the estates to the feoffor, or his heirs, or any other by his direction; the third, that if the feoffee be disseised, and so the feoffor disturbed, the feoffee will re-enter, or bring an action, to re-continue the possession. So that those three, permanency of the profits, execution of estates, and defence of the land, are the three points of a trust or use."

7. As to the legal estate in the land, it was vested in the feoffee to uses, who performed the feudal services, and who was in every respect deemed to be the tenant of the fee; for it was liable to all his incumbrances; his widow was dowable of it; if he died leaving an infant heir, the lord, as guardian to the infant, became entitled to hold the lands during the infancy; and if he was attainted of treason or felony, they were forfeited.

8. The right in conscience and equity to the rents and profits of land, which constituted a use, was not issuing out of the land, but was collateral thereto, and only annexed in privity to a particular estate in the land; that is, the use was not so attached to the land, that when once created, it must still have existed, into whose hands soever the lands passed, as in the case of a rent, or right of common, but it was created by a confidence in the original feoffee; and continued to be annexed to the same estate, as long as that confidence subsisted, and the estate of the feoffees remained unaltered. So that to the execution of a use two things were absolutely necessary; namely, confidence in the person, and privity of estate.

9. Confidence in the person signified the trust reposed in the feoffees, that arose from the notice given them of the use, and of the persons who were intended to be benefited by the feoffment; which was sometimes expressed, and sometimes implied. Thus if a feoffee to uses enfeoffed another person of the land, who had notice of the uses to which such land was liable, the new feoffee took it under an implied confidence, and was compellable to execute the use. For it was resolved that whenever there were feoffees to a use, their heirs and feoffees, and all who came into the land under them, in the *per*, without consideration, and with notice of the use, should be seised to such use, and be compelled

Founded on
confidence in
the person.
1 Rep. 122 a.
Plowd. 352.
Poph. 71.

Bro. Ab. Tit.
Feoff. Al. Use,
pl. 10.

in chancery to execute it. But if a feoffee to uses enfeoffed a stranger of the land, for valuable consideration, and without notice of the use, as, in that case, there was no confidence in the person, either express or implied, the use was destroyed; and the new feoffee could not be compelled to execute it.

1 Rep. 122 b.
Gilb. Uses, 178.

10. If however a stranger purchased lands from a feoffee to uses, for a valuable consideration, with notice of the uses to which the lands had been conveyed, he would in that case be compelled to perform them. For although the consideration implied a seisin to his own use, yet the notice of the former uses was a circumstance which, in the Court of Chancery, would render him liable to the performance of them.

1 Rep. 122 b.
Gilb. Uses, 179.

11. The doctrine of confidence in the person was at first extremely limited, as it only extended to the original feoffee; for Lord Bacon says, the judges in 8 Edw. 4. were of opinion that a *subpana* did not lie against the heir of the feoffee, who was in by law, but that the *cestui que use* was driven to his bill in parliament. It appears however to have been settled in the reign of King Henry VI. that a *subpana* would lie against all those who came in in the *per*, without paying a valuable consideration, and also against all those who had notice of the former uses; although they did pay a valuable consideration.

Read. 23.

Keilw. 42.

12. With respect to privity of estate, it is to be observed that a use was a thing collateral to the land, and only annexed to a particular estate in the land, not to the mere possession thereof; so that whenever that particular estate in the land to which the use was originally annexed was destroyed, the use itself was destroyed. Thus where a person came into the same estate whereof the feoffee to uses was seised, by contract or agreement with him, such person was liable to the performance of the uses. But if he came in of any other estate than that whereof the feoffee to uses was seised, even with full notice of the use; yet as the privity of estate was thereby destroyed, the lands were no longer liable to the uses.

And privity of estate.

1 Rep. 139 b.

13. It followed from these principles that where a feoffee to uses was disseised, the disseisor could not be compelled in chancery to execute the use, because the privity of estate was destroyed. For the disseisor came in in the *post*, that is, he did not claim by or from the feoffee to uses, but came in of an estate paramount to that of such feoffee. Whereas if a person was dis-

Idem.

seised of lands which were liable to a rent, right of common, or other charge of that kind, the lands would still continue subject to those charges, notwithstanding the disseisin; because they were annexed to the possession of the land.

Id. 122 a. 14. In the same manner where a feoffee to uses died without heirs, or committed a forfeiture, or married; neither the lord who entered for his escheat or forfeiture, nor the husband claiming the lands as tenant by the curtesy, nor the wife who was assigned dower, were subject to the uses, because they were not in in the *per*; that is, in privity of the estate to which the use was annexed, but claimed an interest paramount to it.

Who might be
seised to uses.

Read. 58.

Plowd. 102.

Year Book,
7 Edw. 4. 17.

15. With respect to the persons who were capable of being feoffees to uses, all private persons whom the common law enabled to take lands by feoffment, might be seised to a use; and were compellable in Chancery to execute it. Thus Lord Bacon says, "A feme covert, and an infant, though under the years of discretion, may be seised to a use. For as well as land might descend to them from a feoffee to use, so might they originally be enfeoffed to a use." But a corporate body could not be seised to a use; because the Court of Chancery could not issue any process against them for the execution of it. And a corporation could not be intended to be seised to any other's use.

16. Neither the king, nor a queen regnant, on account of their royal capacity, could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the use; as no process could be awarded against them by the Court of Chancery.

Stat. 1 Rich. 3.
c. 5.

17. When King Richard III. was Duke of Gloucester, he had been frequently made feoffee to uses, so that upon his accession to the throne, he would have been entitled to hold the lands so conveyed to him, discharged of the uses. To obviate so notorious an injustice, an act of parliament was immediately passed, by which it was enacted that where the king had been so enfeoffed jointly with other persons, the lands should vest in the other feoffees, as if he had never been named. And that where the king stood solely enfeoffed to uses, the estate should vest in the *cestui que use* in like manner as he had the use.

Bac. Read. 57.

18. A queen consort could not be seised to a use; for although she was enabled to grant and purchase without the

king, yet in regard of the government and interest which the king had in her possessions, she could not be seised to a use.

19. With respect to the species of property which might be conveyed to uses, it was held that nothing whereof the use was inseparable from the possession, such as annuities, ways, commons, &c. *quæ ipso usu consumuntur*, could be granted to a use. But that all corporeal inheritances, as also incorporeal hereditaments, which were *in esse*, as rents, advowsons in gross, local liberties, and franchises, might be conveyed to uses.

What might be conveyed to uses.

W. Jones 127.

20. A use being a species of property totally unknown to the common law, and owing its existence to the equitable jurisdiction of the Court of Chancery, the rules by which uses were governed were derived from the civil law; and differed materially from those by which real property was regulated in the courts of common law. Hence Lord Bacon has observed, that uses stood upon their own reasons, utterly differing from cases of possession.

Rules by which they were governed.

Read. 13.

21. By the common law, a feoffment of land was good without any consideration. But Lord Bacon says it was established in Chancery, that a use could not be raised without a sufficient consideration; a doctrine evidently taken from the maxim of the civil law, *ex nudo pacto non oritur actio*. In consequence of which the Court of Chancery would not compel the execution of a use, unless it had been raised for a good or a valuable consideration; as that would be to enforce a *donum gratuitum*.

Could not be raised without a consideration. Read. 13.

22. A use not being considered as an estate in the land, was not an object of tenure; and was therefore exempt from all those oppressive burthens which were introduced into England by the Normans, as consequences of the feudal system. Thus if a *cestui que use* died, leaving a son, or a daughter within age, the lord had not the wardship or marriage of the heir, or a relief on the death of the ancestor; nor could he claim the lands as an escheat, on the death of the *cestui que use* without heirs.

Not an object of tenure.

1 Inst. 76. b.

23. After the ecclesiastics had been restrained by the stat. 15 Rich. 2. c. 5. from acquiring the use of lands, it might be supposed that the practice of conveying lands to uses would have ceased. But it was soon found that this was the most effectual mode of evading the hardships of the feudal tenures.

Not subject to
forfeiture.

1 Inst. 272. a.

24. Where a *cestui que use* was attainted of treason or felony, the use was not forfeited, either to the king, or to the lord of the fee; because a use was not held of any person. So that during the contests between the houses of York and Lancaster, as it was the constant practice to attain the vanquished, almost all the lands of the nobility were conveyed to uses.

25. In some general acts of parliament relating to treason, as that of 21 Rich. 2. c. 3. and in most particular acts of attainder passed after that time, there was a special provision made, that the persons attainted should forfeit all lands whereof they, or any to their use, were seised. And in most of those acts provision was also made to save from forfeiture such lands whereof the persons attainted were seised, to the use of others.

Not extendible
on assets.
1 Rep. 121. b.
1 Inst. 374. b.

26. A use was not extendible, because there was no process at common law, but against legal estates; for uses were mere creatures of equity; so that many persons conveyed their lands to uses for the purpose of defrauding their creditors. And as a use was neither a chattel nor an hereditament, it was not assets to executors, or to the heir.

Not subject to
curtesy or
dower.

Perk. s. 457.
Tit. 5 & 6.

Tit. 7. c. 1.

27. Another circumstance attending a use was, that the husband or wife of a *cestui que use* could neither acquire an estate by the curtesy or in dower in the use; because the *cestui que use* had no legal seisin of the land. This was a grievance much complained of, particularly as to dower; and, therefore, it became customary, when most estates in the kingdom were vested in feoffees to uses, to settle some estate, before marriage, on the husband and wife for their lives; which, as we have seen, gave rise to the modern jointure.

Uses were
alienable.

Read. 16.

28. Although a use was but a right, and could only be considered as a chose in action; which, according to the principles of the common law, is neither transferrible nor assignable, yet a use might be aliened. And Lord Bacon mentions two cases in which a right to a use was allowed to be transferred; for as no action at law could arise from such a transfer, there was no danger of maintenance.

29. A use might be transferred by one person to another, by any species of deed or writing. And, from its nature, it was impossible that it could be the subject of a feoffment, with livery of seisin.

Read. 14.

30. Lord Bacon says there is no case at common law, where a

person can take under a deed, unless he is a party to it. Whereas Tit. 32. c. 2.
a use might be declared to a person who was not a party to the deed by which the use was raised ; because a conveyance to a use was nothing but a publication of a trust.

31. It frequently happened that *cestui que use* being in possession, aliened the lands, and afterwards the feoffees entered, which gave rise to several vexatious suits in Chancery. To remedy this inconvenience the statute 1 Rich. 3. c. 1. gave the *cestui que use* in possession a power of alienating the legal estate, without the consent or concurrence of the feoffees.

32. In the alienation of uses none of those technical words which the law requires in the limitation of particular estates were deemed necessary. Thus a use might be limited in fee simple without the word heirs ; for if a sufficient consideration was given, the Court of Chancery would decree the absolute property of the use to be well vested in the purchaser. And as a use was a thing which consisted merely in confidence and privity, and was not held by any tenure, the rules of the common law were not violated.

Without words
of limitation.

1 C. 1. 94/662

33. If an estate had been limited at common law to a man, and to such woman as he should afterwards marry, the man would have taken the whole, and the limitation to the woman would have been void ; because a freehold could not be created to commence *in futuro* : but the limitation of a use in this manner would have been good. So if a man had made a feoffment to the use of one for years, and after to the use of the right heirs of J. S., this limitation had been good, for the feoffees remained tenants of the freehold.

Might com-
mence *in futuro*.
1 Rep. 101. a.
Jenk. Cent. 8.
ca. 52.

34. It was determined upon the same principles that a power of revocation might be annexed to the limitation of a use ; by which means the grantor might at any future time revoke the uses he had declared, and limit new uses to other persons ; which the feoffee to uses was bound to execute.

Id. 135. a.
Tit. 16. c. 4.

Might be re-
voked.

35. A use might be limited in such a manner as to change from one person to another, upon the happening of some future event. Thus a use might be limited to A. and his heirs, until B. should pay him 40*l.* ; and upon payment of that sum, the use should change and vest in B. and his heirs. For though the rules of the common law did not allow any estate to be limited after an estate in fee simple, yet the Court of Chancery admitted

And change by
matter subse-
quent.

Bro. Ab. Feoff.
al. Use, 30.

Read. 18. this species of limitation to be good in the case of a use. Because, as Lord Bacon observes,—" Things may be avoided and determined by the ceremonies and acts like unto those by which they are created and raised: that which passeth by livery, ought to be avoided by entry; that which passeth by grant, by claim; that which passeth by way of charge, determineth by way of discharge. And so a use, which is raised but by declaration or limitation, may cease by words of declaration or limitation; as the civil law saith, *in his magis consentaneum est ut eisdem modis res dissolvantur quibus constituentur.*"

Were devisable. 36. Uses were devisable, though at that time lands were not.
Read. 20.
1 Rep. 123. b. And Lord Bacon observes, that one of the reasons why so much land was conveyed to uses was, because persons acquired, by that means, a power³ of disposing of their real property by will, which enabled them to make a much better provision for their families than they could otherwise have done.

Mich. 18
Edw. 4. 37. One of the first cases in the Year Books respecting uses, was this: A woman who had made a feoffment to uses afterwards married, and by her will directed that her feoffees should convey the legal estate to her husband. It was adjudged that the will was void at law, being made by a feme covert; and, therefore, should also be void in chancery.

And descendible. 38. Uses were descendible in the same manner as legal estates. And this was the only instance in which the Court of Chancery, in cases of uses, followed the rules of the common law.
1 Inst. 14. b. For the doctrine of the half-blood was allowed to take place in the descent of uses. And even local customs were left unviolated in this instance. So that where a *cestui que use* of lands held in gavelkind or borough English died, leaving several sons, the use descended either to all of them, or to the youngest, according to the custom.

Gilb. Uses 17. 39. It was held upon the same principle that if lands descended on the part of the mother, and the person in possession made a feoffment to uses, the use should descend to the heirs on the part of the mother, "because the legal estate would have gone to them."
Tit. 29. c. 3.

Inconveniences of Uses. 40. Thus stood the doctrine of uses, as regulated and settled by the Court of Chancery; and in this state it was, in some instances, applied to very useful purposes, by removing the restraints on alienation, and enabling the proprietors of real pro-

perty to exercise several powers over it, which were not allowed by the rules of the common law. But uses became so general, and were applied to such bad purposes, that at length they were productive of very great grievances. Feoffments to uses were usually made in a secret manner, so that where a person had cause to sue for land, he could not find out the legal tenant, against whom he was to bring his *precipe*. Husbands were deprived of their estates by the curtesy, and widows of their dower; creditors were defrauded; the king, and the other feudal lords, lost the profits of their tenures, their wardships, marriages, and reliefs, and an universal obscurity and confusion of titles prevailed, by which means purchases for valuable consideration were frequently defeated.

41. As a remedy for these inconveniences, several statutes were made to subject uses to the same rules as legal estates. By the stat. 50 Edw. 3. it was enacted that where persons conveyed their tenements to their friends by collusion, to have the profits at their will, their creditors should have execution of such tenements, as if no such gifts had been made. By the stat. 1 Rich. 2. c. 9. a feoffment of lands for maintenance was declared to be void, and an assise maintainable against the pernor of the profits of lands. And by 2 Rich. 2. st. 2. c. 3. fraudulent deeds made by debtors to avoid their creditors are declared void. Statutes made to remedy them.

42. By the stat. 1 Hen. 7. c. 4. reciting that divers of the king's subjects having cause of action by *formedon*, &c. were defrauded and delayed of their said actions, and oftentimes without remedy, because of feoffments made of the same lands and tenements to persons unknown, &c. It was enacted that the demandant, in every such case, should have his action against the pernor or perners of the profits of the lands and tenements demanded, whereof any person or persons had been enfeoffed to his or their use.

43. By the statute 4 Hen. 7. c. 17. it was enacted, that if any person or persons should be seised of any estate of inheritance, being tenant immediate to the lords of any castles, &c. holden by knight-service, to the use of any other person or persons, and of his heirs only, and he to whose use he or they were so seised dieth, his heir being within age, no will by him declared, nor made in his life touching the premises, the lord of whom such castles, &c. were holden immediately, should have a writ of right

of ward, as well for the body as for the land, as the lord should have had if the same ancestor had been in possession of the estate, so being in use at the time of his death, and no such estate to his use made: and that if any such heir was of full age at the death of his ancestor, to pay relief as his ancestor, whose heir he was, would have paid if he had been in possession of that estate, so being in use at the time of his death, and no such estate to his use made or had.

44. By the statute 19 Hen. 7. c. 15. it was enacted, that it should be lawful for every sheriff, or other officer to whom any writ or precept should be directed, at the suit of any person or persons, to have execution of any lands, tenements, or other hereditaments, against any person or persons, upon any condemnation, statute merchant, &c., to make and deliver execution unto the party in that behalf suing, of all such lands and tenements as any other person or persons were in any manner seised, to the only use of him against whom execution was so sued.

Distinction between uses and trusts before the stat. 27 Hen. 8. c. 10.

45. [Before the statute of the 27 Hen. 8. c. 10. it seems a distinction was established between uses, the nature and properties of which have been considered in the preceding chapters of the present title, and trusts. Sir Francis Bacon says, where the trust is not special nor transitory, but general and permanent, there it is a "use." Thus where feoffor enfeoffs feoffee in fee upon a trust or confidence, that he would permit the feoffor and his heirs to take the rents and profits, or to make such conveyances of the legal estate as he or they should direct. But where the trust was special or transitory, it was not in strictness a use, but a trust. Thus where the feoffor enfeoffs the feoffee in fee, to the intent to re-enfeoff him, or to be vouched, or to suffer a recovery: this Bacon denominates the special trust lawful.](a)

Bac. Uses, 8.
2 Saik. 676.

(a) [For a more detailed consideration of the above distinction and its consequences, see Sanders' Uses, vol. i. chap. i. s. 2.]

CHAP. III.

*Statute 27 Hen. 8. of Uses.*SECT. 1. *Statement of the Statute.*5. *Circumstances necessary to its Operation.*6. *I. A Person seised to a Use.*7. *What Persons may be seised to Uses.*11. *Of what Estates.*12. *Estates Tail.*17. *Estates for Life.*SECT. 20. *What may be conveyed to Uses.*23. *II. A Cestui que Use in esse.*26. *In what case the Statute operates.*33. *III. A Use in esse.*35. *The Statute then transfers the Possession.*37. *Saving of all former Estates.*

SECTION I.

NOTWITHSTANDING the variety of statutes by which it was endeavoured to render uses subject to the rules of the common law, means were found of evading them, particularly as to the feudal profits upon marriages, wardships, and reliefs; for in the stat. 4 Hen. 7. for enabling lords to have the wardship of persons entitled to a use only, an exception was inserted, that it should not take place where the ancestor had made a will, of which many persons took advantage, to the great detriment of the king, and the great nobility.

Statement of the statute.

Ante, c. 2. s. 43.

2. It is mentioned in Burnet's History of the Reformation, and also by Mr. Justice Harper, that King Henry VIII. in the 23d year of his reign, caused a bill to be brought into parliament to remedy the abuses that arose from the universal practice which then prevailed, of making feoffments to uses, which was rejected by the Commons. But four years after parliament passed the stat. 27 H. 8. c. 10. intituled, "An Act concerning Uses and Wills," usually called, The Statute of Uses: reciting that by the common law, lands were not devisable by will, nor ought to be transferred but by livery of seisin; yet, nevertheless, divers

Vol. I. 116.
2 Leon. 16.

and sundry imaginations, subtle inventions and practices, had been used, whereby the hereditaments of the realm had been conveyed by fraudulent feoffments, fines, recoveries, and other assurances; and also by wills and testaments; by reason whereof heirs had been unjustly disinherited; the lords had lost their wards, marriages, reliefs, heriots, escheats, aids, &c.; married men had lost their tenancies by the curtesy; widows their dower; and manifest perjuries were committed.

3. It is, therefore, enacted (s. 1.), "That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner or means, whatever it be; that in every such case all and every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence, or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence, or trust, in remainder or reversion, shall from henceforth stand and be seised, deemed and adjudged, in lawful seisin, estate, and possession of and in the same honours, castles, &c. to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons, that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence or trust, after such quality, manner, form, and condition, as they had before, in or to the use, confidence, or trust that was in them.

s. 2.

"That where divers and many persons be or hereafter shall happen to be jointly seised of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any of them that be so jointly seised; that in every such case, those person or persons which have or hereafter shall have any such use, confidence or trust in any such lands, &c. shall from henceforth have, and be deemed and adjudged to

have, only to him or them that have or hereafter shall have any such use, confidence, or trust, such estate, possession, and seisin of and in the same lands, &c. in like nature, manner, form, condition, and course, as he or they had before in the use, confidence, or trust of the same lands, tenements, or hereditaments."

4. It is evident from the words of this statute, that the intention of the Legislature was entirely to abolish uses, by destroying the estate of the feoffees to uses, and transferring it from them to the *cestui que use*, by which means the use should be changed ^{2 Leon. 17.} into a legal estate; and the statute has so far answered the intention of the makers of it, that no use, upon which the statute operates, can exist in its former state for more than an instant; as the legal seisin and possession of the land must become united to it, immediately upon its creation, so that where this statute operated, lands conveyed to uses could never, in future, become liable to the charges or incumbrances of the feoffees: but, on the other hand, would be always subject to the charges and incumbrances of the *cestui que use*, and to all the rules of the common law. Thus they ceased to be devisable; and by that means the great object of King Henry VIII. was attained, which was to preserve his right to wardship, and other feudal profits, out of the lands of the nobility.

5. There are three circumstances necessary to the execution of a use under this statute. 1. A person seised to the use of some other person. 2. A *cestui que use in esse*. And, 3. A use *in esse*, in possession, remainder, or reversion. Circumstances necessary to its operation.

6. With respect to the first of these circumstances, the words of the statute expressly require it; for these are, "Where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, &c. to the use, confidence, or trust of any other person or persons." It will, therefore, be necessary in this place to enquire—first, what persons are capable of being seised to uses; and, secondly, of what estate or interest they can be so seised. 1. A person seised to a use.

7. All those who were capable of being seised to uses before the statute may still be seised to a use. On the other side, all those who were incapable of being seised to uses before the statute still labour under the same incapacity. What persons may be seised to uses.

8. It has been stated that neither the king nor the queen

could, before the statute, have been seised to a use, or, rather, were not compellable to execute the use. This law continued after the statute; and a singular case arose in 35 Eliz. respecting the prerogative of the crown to hold lands discharged of all uses.

Pimb's case,
Moo. 196.
1 Inst. 13 a.
n. 7.

9. A. committed high treason in 18 Eliz., for which he was attainted in 26 Eliz. Between the treason and the attainder a fine was levied to him by B. of certain lands, to the use of B. and his wife (who was sister to A.) and of the heirs of the said B. Afterwards B. bargained and sold the lands to J. S. for money. Upon discovery of the treason and the attainder of A. the purchaser was advised by Plowden, Popham, and many others, that the land was in the queen; because the queen was entitled to all the lands that traitors had, at the time of the treason, or after; so the use which was declared to B. and his wife upon the fine was void, by the relation of the right of the queen under the attainder; and the queen must hold the land, discharged of the use; because she could not be seised to a use. It is but justice to mention, that the case being represented to Queen Elizabeth, she granted the land to the *cestui que use*.

Bac. Read.
42—57.

King v. Boys,
Dyer, 283.

10. By the words of the statute, which are, “any person or persons,” aliens and corporations are excluded from being seised to a use. It was, therefore, determined in a case reported by Dyer, that where an alien and a natural born subject were enfeoffed to uses, the moiety of the alien should, upon office found, become vested in the crown.

Of what estates.

11. With respect to the estate or interest of which a person may be seised to a use, the words of the statute are—“Where any person or persons stand or be seised, or at any time hereafter shall happen to be seised.” Now, the word *seised* extends to every species of freehold estates; although it appears to have been the general opinion, before and immediately after the passing of this statute, that all feoffees to uses must have been seised in fee simple.

Estates Tail.
Cent. 5. Ca. 1.

12. It was, therefore, much doubted whether a tenant in tail could be seised to a use. Jenkins states it as a point determined by all the Judges, that a tenant in tail could not be seised to a use, either expressed or implied. 1. Because the tenure creates a consideration. 2. Because the statute *De Donis* has so appropriated and fixed the estate tail to the donee, and the

heirs of his body, that neither he nor they can execute the use. Hence Lord Coke has said, that if an estate was made to a man and the heirs of his body, either to the use of another and his heirs, or the use of himself and his heirs, this limitation of use was utterly void. 1 Inst. 19. b.

13. The case upon which Lord Coke and Jenkins have founded their opinion, is that of *Cooper v. Franklin*, which arose in 12 Jac. 1., and is thus reported by Croke:—John Walter being seised in fee, made a feoffment in fee to Thomas Walter, *habendum* to him and the heirs of his body, to the use of him and his heirs and assigns for ever. The question was, whether Thomas Walter had an estate in fee tail only, or in fee simple determinable upon the estate tail. This depended upon two points:—1st, Whether a use might be limited upon an estate tail before or after the statute of uses. 2dly, Whether this limitation of uses to Thomas Walter and his heirs should not be intended the same uses, being to the feoffee himself, and to the same heirs, as it was in the *habendum*. Cro. Ja. 400.

Croke reports the case to have been adjourned: but that the opinion of the Court upon the argument inclined that he was tenant in tail; and that the limitation of the use out of the estate tail was void, as well after the Statute of Uses as before; for the statute never intended to execute any use but that which might be lawfully compelled to be executed before the statute: but this could not be of an estate tail, for the Chancery could not compel a tenant in tail, before the statute, to execute the estate; so the statute did not execute it then.

Bulstrode reports a second argument upon this case, together with the judgment of the Court; which was, that Thomas Walter took an estate tail, because a tenant in tail could not be seised to a use. 3 Bulst. 184.

Godbolt reports the case to have arisen upon a limitation to one and the heirs of his body, *habendum* to the donee, to the use of him, his heirs, and assigns, for ever; and that two points were resolved, 1st, That the limitation in the *habendum* did not increase or alter the estate given in the premises of the deed, 2dly, That a tenant in tail might stand seised to a use expressed, but such use could not be averred. Id. 269.

The same case is also reported by Moor by the name of *Carr v. Franklin*, where the court appears to have considered it as Id. 848.

a question of construction ; and held that the feoffee only took an estate tail, because the use to him and his heirs, immediately succeeding the *habendum*, must be construed to mean the same kind of heirs to whom the estate had been already limited, namely, the heirs of the body of the feoffee.

14. If this case be considered as an authority, it will only prove that a tenant in tail cannot be seised to a use in fee. (a) But that a tenant in tail may be seised to a use, co-extensive with his estate, is a doctrine which it would now be extremely dangerous to controvert. And Lord Bacon expressly says, that a tenant in tail may be seised to a use. " If I give land in tail by deed, since the statute, to A. to the use of B. and his heirs ; B. hath a fee simple determinable upon the death of A. without issue ; and like law, though doubtful, before the statute was ; for the chief reason that bred the doubt before the statute was, because tenant in tail could not execute an estate without wrong ; but that, since the statute, is quite taken away ; because the statute saveth no right of entail, as the statute of 1 Richard III. did."

Read. 57.

10 Rep. 95.
Plowd. 557.
Tit. 32. c. 9.

15. In Seymour's case, 10 Jac. 1. where a tenant in tail bargained and sold his estate tail to a stranger in fee, it was unanimously resolved by the Court of K. B. that the bargainee took an estate to him and his heirs, determinable upon the death of the tenant in tail.

16. It may, therefore, be now laid down as an undoubted principle of law, that a tenant in tail may be seised to a use, even in fee ; and that such use will be good against the tenant in tail himself ; for as tenants in tail have, ever since the time of Lord Coke, been in the practice of transferring their estates to the persons who were to be tenants to the *præcipe* in common recoveries, in fee simple, by conveyances derived from the Statute of Uses, if it were established that a tenant in tail cannot be seised to a use, the consequence would be, that almost all the common recoveries which have been suffered for the two last centuries would be void for want of a good tenant to the *præcipe*.

(a) [The case of *Cooper v. Franklin* was simply one of construction, it is no authority that a tenant in tail cannot stand seised to the use of another ; for there, the seisin and the use were limited to the same person (Thomas Walter), so that no use could arise under the statute, which requires that one or more persons should be seised to the use of some other person or persons, &c.]

17. A tenant for life may also be seised to a use : but such use will determine, together with the legal estate, which is transferred to it by the statute upon the death of the tenant for life ; for a *cestui que use* cannot have an estate in the use of greater extent than the seisin out of which it is raised. Estates for life.

18. In 2 & 3 Eliz. this case was moved :—Lands were given to two persons for their lives, and the life of the survivor of them, to the use of A. B. for his life. The two donees to uses died ; and the question was, whether the estate to A. B. was determined. The Court thought it was determined : because the estate on which the use was created and raised was gone. Dyer, 186. a.
pl. 1.
Crawley's case,
2 And. 130.

19. It follows from this case, which is cited and admitted to be good law in Bulstrode's report of the case of Cowper v. Franklyn, and also in a case reported by Croke ; that all persons having a legal estate of freehold may be seised to a use. If the use is greater than the estate out of which it is limited, it will cease upon the determination of that estate, but will be good in the mean time. Cro. Car. 231.

Norton v.
Frecker,
1 Atk. 523.

20. With respect to the different kinds of property whereof a person may be seised to the use of another ; the words of the statute are,—“ Honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments,” which comprehends every species of real property, in possession, remainder, or reversion. Therefore not only corporeal hereditaments, but also incorporeal ones, such as advowsons, tithes, rents, &c. are within this statute. Nothing, however can be conveyed to uses but that of which a person is seised or to which he is entitled to at the time ; for in law every disposal supposes a precedent property. No person can, therefore, convey a use in land, of which he is not seised in possession, or to which he is not entitled in remainder or reversion, when the conveyance is made. What may be
conveyed to
uses.

Cro. Eliz. 401.
22 Vin. Ab.
217.

21. Lord Bacon says the word hereditament in the statute of uses is to be understood of those things whereof an inheritance is *in esse* ; yet that a grant of a rent charge *de novo*, for life, to a use was good enough ; although there were no inheritance in being of the rent. It should however be observed that in this case there is a seisin of the land out of which the rent is granted. Read. 43.

Co. Cop. s. 64.
Gilb. Ten. 182.
Cowp. R. 709.

22. Copyhold estates are not however comprised in the statute of uses ; because a transmutation of possession, by the sole operation of the statute, without the concurrence or permission of the lord, would be an infringement of his rights, and tend to his prejudice.

II. A *cestui que use in esse*.

23. The second circumstance necessary to the execution of a use by this statute is, that there must be a *cestui que use in esse*. If therefore a use be limited to a person not *in esse*, or to a person uncertain, the statute can have no operation. But by the words of the statute a *cestui que use* may be entitled to an estate in fee simple, or fee tail, term for life, or years or otherwise, or in remainder or reversion.

Read. 60.

24. With respect to those who may be *cestuis que use*, all persons who are capable of taking lands by any common law conveyance may also have a use limited to them. By the words of the statute, corporations may be *cestuis que use*. And Lord Bacon says the king may have a use limited to him : but it behoveth both the declaration of the use, and the conveyance itself, to be by matter of record ; because the king's title is compounded of both.

1 Inst. 112 a.

25. Although a man cannot, by any conveyance at common law, limit an estate to his wife, yet he might have made a feoffment to her use, or a covenant with another to stand seised to her use. And a use now raised by a man to his wife will be executed by the statute.

In what cases the statute operates.

Read. 63.

26. The *cestui que use* must in general be a different person from him who is seised to a use ; for the words of the statute are, —“ Where any person or persons stand or be seised, &c. to the use, confidence, or trust, of any *other* person or persons, &c.” And Lord Bacon says,—“ The whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate. Therefore the common law ought to be expounded, that where the party seised to the use, and the *cestui que use*, is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law.”

Jenkins v.
Young,
Cro. Car. 230.
Dyer 186 a. n.

27. Thus, where lands were given to a man and his wife, *habendum* to the said husband and wife, to the use of them and the heirs of their two bodies ; and for default of such issue, to the use of A. B. ; the question was, whether the husband and

wife had an estate tail, or only an estate for their lives. It was adjudged that they took an estate tail.

Upon a writ of error in the King's Bench, it was argued that the estate out of which the use arose was but for their lives, consequently the use could not be limited for a larger estate. But Croke, Jones, and Whitlock, were of opinion, that there was a difference where an estate was limited to one, and the use to another; there the use could not be more than the estate out of which it was derived. That it was otherwise where the limitation was to two persons, *habendum* to them, to the use of them and the heirs of their bodies: this was no limitation of the use, nor was the use to be executed by the statute, but they took by the common law.

28. The same point arose in the subsequent term, in a writ of error from a judgment given in Wales. The court held the limitation in the *habendum*, to the use of the grantees and the heirs of their bodies, to be as a limitation of the land itself, being all to one person; as if it had been said, *habendum* to them and to the heirs of their bodies; and not like the case in Dyer, 186. For true it was, when the estate was limited to one or two, to the use of others and their heirs, the first estate was not enlarged by this implication, and the use could not pass a greater estate. But here, when the grant and *habendum* conveyed the estate, and the limitation of the use was to the same person, that shewed the intent of the parties, and was a good limitation of the estate; for it was not an use divided from the estate, as where it was limited to a stranger, but the use and estate went together; wherefore it was all one as if the limitation had been to them and their heirs of their bodies. Sir William Jones said he knew many conveyances had been made in this manner, and twice brought in question, and adjudged to be an estate tail.

Meredith v.
Jones,
Cro. Car. 244.

Ante, s. 27.

29. It was held by Holt, C. J. and Powell, in a subsequent case, that when a fine was levied, or a feoffment made, to a man and his heirs, the estate was in the cognizee or feoffee, not as an use, but by the common law; and might be averred to be so. This doctrine is most ably discussed by Mr. Booth, in an opinion on the following case:—An estate was conveyed by lease and release to D, C. and S. and their heirs, to hold unto the said D, C. and S. for and during the natural lives of them and the survivor and survivors of them. The question was, whether they

Gilb. Rep. 16,
17.

Cases and Opin.
Vol 2. 281.

took by the common law, or by the statute of uses. As to this point Mr. Booth says,

“ We will now return to the words of the *habendum* in the release ; taking the words, ‘ to the use.’ The *habendum* stands literally thus ; to hold unto the said D. and his companions, their heirs and assigns, to the only proper use and behoof of the said D. and his companions, their heirs and assigns, for and during the natural lives of the said D. and his companions, and the life and lives of the survivor and survivors of them. Here you observe the use limited is not limited to any person different from the person to whom the estate is granted. The *habendum* is to D. and his companions, and the use is limited to D. and his companions ; so that the estate and the use are both to one and the same person ; and therefore this cannot be a statute use, for the seisin doth not go or belong to one person, and the use to another person ; whereas the statute requires that there should be a standing seised by some third person or persons to the use of some *other person*. And that case of *Young v. Jenkins* is express, that where the use is not divided from the estate, and the use and the estate go together, there it amounts only to a limitation of the estate, and consequently is not a statute use, but only a common law use. And if at this day a man should enfeoff I. S. to hold to the said I. S. and his heirs, to the use and behoof of the said I. S. and his heirs for ever, no man living would call that a statute use ; for the words would import no more than the words, “ for his and their sole benefit and behoof ;” and would only serve to shew in how ample and beneficial a manner the feoffee was to take the estate limited to him by the *habendum* ; which being manifestly an estate at common law, could not also give or create a statute use. The words of Lord Holt in the case of *Lord Altham v. Earl of Anglesey*, before recited, are directly in point. In like manner it would be, if there were a feoffment to a man and his assigns, to hold to that man and his assigns, to the only use and behoof of him and his assigns, during his life ; that would only limit an estate of freehold to him for his life, at common law ; and not be the limitation or creation of any statute use. It would be the same in the case of a feoffment to one of lands, to hold to the feoffee and his heirs, to the only use and behoof of the feoffee and his heirs, during the lives of A. B. C. D. and

Ante, s. 27.

Doe v. Passingham, 6 Bar. & Cress. 305.

twenty other persons. There the words to the use and behoof would pass no statute use, or pass any thing distinct from the estate; which estate would be an estate at common law; and the words to the use and behoof would serve only to shew the amplitude of the estate given by the feoffment; and that the feoffee and his heirs were to take the same for his and their own benefit, without return of any service whatever to the donor,”

30. There are, however, some cases where the same person may be seised to a use, and also *cestui que use*. Thus if a man makes a feoffment in fee to one, to the use of him and the heirs of his body; in this case, for the benefit of the issue, the statute, according to the limitation of the uses, directs the estate vested in him by the common law, and executes the same in himself, by force of the statute. And yet the same is out of the words of the statute, which are,—“To the use of any other person.” And here he is seised to the use of himself. But the statute has always been beneficially expounded, to satisfy the intention of the parties, which is the direction of the use, according to the rule of law.

Bac. R. 63.
13 Rep. 56

31. So if a man seised of lands in fee simple covenants with another, that he and his heirs will stand seised of the same land, to the use of himself and the heirs of his body; or to the use of himself for life, the remainder over in fee. In that case, by the operation of the statute, the estate which he hath at the common law is divested, and a new estate vested in himself, according to the limitation of the use.

13 Rep. 56.

32. Lord Bacon says, if a person enfeoffs I. S. to the use of I. D. for life, remainder to the use of I. S. for life, remainder to the use of I. N. in fee, I. S. is in by the statute; because the law will not admit fractions of estates. So if a person enfeoffs I. S. to the use of himself and a stranger, they shall both be in by the statute, because they cannot take jointly, taking by several titles. Like law, if I enfeoff a bishop and his heirs, to the use of himself and his successors; he is in by the statute, in right of his see.

Read. 64.

33. [The statute 27 Hen. 8. c. 10. enacts that where one or more persons stand seised to the “use, trust, or confidence of any other persons, &c. such persons, &c. that have the use, trust, or confidence shall be adjudged in the lawful seisin, estate, and possession,” &c. Hence it follows that where lands are conveyed to A and his heirs in trust for B. and his heirs, the

Ante, s. 3.
Bac. Uses, 47.
Eure v. Howard,
Pre. Cha. 318.
345. Broughton
v. Langley,
2 Salk. 679.
Right v. Smith,
12 East. 454.

Hummerston's
case, Dyer 166
a. note (9).

legal estate or use executes in B. So also where a limitation is to A. and his heirs, to the intent and purpose that B. and his assigns may receive and take a rent-charge for his life, or that he and his assigns may receive the rents and profits during his life, in the one case he takes the legal estate for life, and in the other a legal rent-charge.]

III. A use *in
esse*.
1 Rep. 126 a.

34. The third circumstance necessary to the execution of a use by this statute is, that there should be a use *in esse*, in possession, remainder, or reversion. And this use may either be created by an express declaration, or may result to the original owner of the estate, or arise from an implication of law.

Infra, c. 4.

The statute
then transfers
the possession.

35. When these three circumstances concur, the possession and legal estate of the lands, out of which the use was created, is immediately taken from the feoffee to uses, and transferred by the mere force of the statute to the *cestui que use*. And the seisin and possession thus transferred is not a seisin and possession in law only, but an actual seisin and possession in fact: not a mere title to enter upon the land, but an actual estate.

Bac. Read. 46.
Cro. Eliz. 46.

1 Inst. 266 b.

36. Lord Coke appears to have been of opinion, that by a conveyance to uses, executed by the statute, only a freehold in law passed. And others have said that the statute only transfers a civil seisin, it being impossible for an act of parliament to give an actual seisin; therefore that an entry is necessary to complete the seisin. It has, however, been found that the admission of this principle would be attended with dangerous consequences; it is therefore now held that the statute transfers the actual possession; a construction fully warranted by the words of the statute, which are "every person having a use shall be in lawful seisin, estate, and possession, to all intents, constructions, and purposes, in the law."

Gilb. Uses, 230.

Barker v.
Keate,
Tit. 32. c. 11.

Saving of all
former estates.

37. The third section of the statute contains a saving "to all and singular those persons, and to their heirs, which were or thereafter should be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services, and action, as they or any of them might have, to his and their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof they were, or thereafter should be, seised to any other use; as if the said act had not been made.

Vide infra, Tit.
20.

38. In consequence of this clause, no term for years or other interest whereof a person, to whom lands are conveyed to uses,

is possessed in his own right, will be merged or destroyed by such conveyance.

39. A husband being seised in fee, made a lease to O. and S. in secret confidence, for the preferment of his wife. Afterwards he made a feoffment to O. and others, of the same lands to other uses. It was decreed in the Court of Wards, by the advice of Wray, Anderson, and Manwood, that the term was not extinguished by the feoffment, by reason of the proviso; and because O. had the lease to his own use, it was not extinguished by the feoffment, which he took to the use of another.

Cheyney's case,
Moo. 196.
2 And. 192.

40. A. demised lands to B. for 99 years; afterwards A. by bargain and sale enrolled, and fine, conveyed the same lands to B. and others and their heirs, to the use of them and their heirs, to the intent that a common recovery should be had and suffered against them, with voucher of the lessor, to the use of a stranger; all which was done accordingly. The question was, whether the term for years was merged.

Ferrers v.
Fermor,
Cro. Jac. 643.
1 Vent. 195.
1 Mod. 107.

Resolved, that the term still subsisted; for although it was merged by the union of the estates, till the recovery was suffered, yet when that was done, the uses thereof being guided by the bargain and sale, it was the same as if there had been no conveyance; it being within the equity and intent of the saving in the third section of the statute of uses: for the intention of that statute was not to destroy prior estates, but to preserve them. It was also agreed by the whole court, that if a fine or feoffment had been levied or made to the lessee for years, his term would not have been thereby extinguished. An objection was made that the bargain and sale, and fine, were to the use of the lessee for years, otherwise he could not have been tenant to the freehold; therefore the saving in the statute of uses did not extend to this case; but it was answered and resolved, for the former reasons, that the term was saved by the equity of the statute.

41. The saving in the statute of uses extends to those cases where the inheritance is conveyed by lease and release.

42. Cook let to Fountain for 99 years; two years after Cook conveyed the inheritance by lease and release to Fountain and another, to the use of Cook and the heirs of his body, with divers remainders over. The question was, whether by this conveyance the lease for 99 years was merged and destroyed, in all or in part. First, it was agreed, that if such conveyance to uses had been by

Cook v.
Fountain,
Bac. Ab. Tit.
Lease, R.

fine or feoffment, it would not have been destroyed, but would have been preserved by the saving in the statute of uses. So likewise it was admitted, that if there had been no lease for a year, but the release had been immediate to the lessee for 99 years, to such uses, in this case also the lease for 99 years had been preserved by force of that statute: but here being a lease for a year precedent, it was argued that this was to the use of the lessee, and then by acceptance thereof, he admitted the lessor's power to make such lease; and by consequence before the release to the other uses came to take place, then the release after could not revive it: it was also said, that though this were all one conveyance, yet it differed from a feoffment, for it would not purge a disseisin, nor make a discontinuance: that if, before the release, the lessee granted a rent charge or made a lease for half a year, and then a release was made to him and his heirs to such uses, yet he who had the inheritance would have no remedy to avoid these charges but in Chancery.

On the other side it was argued, that this was no merger of the 99 years' term: or if it were, yet for no more than a moiety: for the reason of merger and extinguishment was not, as had been argued, the party's admittance of the lessor's power to make a lease, but the merger was effected by the accession of the immediate reversion to the particular estate; therefore a new lease by the lessor to his lessee was not a merger or surrender of the first term, if there was any interposing or intermediate term; yet, in that case, the lessee admitted the lessor's power to make the lease presently, as much as in the other. Then if the union and accession of the two estates were the cause of the merger, the *quantum* of the thing granted would be the measure of that merger; by consequence the first lease here would be extinguished, but for a moiety of the lands. Secondly, that it was not extinguished for any part, for the term was saved within the letter, or at least within the equity, of the statute 27 Hen. 8. c. 10. s. 3.; for the intent of the saving therein was to preserve the balance between the *cestui que use* and his feoffees, according to the rule of equity, by which they were governed before. Now suppose that Fountain had a lease for 99 years before this statute, and that Cook had desired him to accept a feoffment to his use; without doubt the Chancery would not have compelled him to assign, till the 99 years' term expired. And the same right

seemed now to be preserved by the saving ; for the words were general—" All that shall be seised to any use," not all that shall be seised by feoffment or fine : so that the seisin to use was the only thing the statute regarded, not by what sort of conveyance : that lease and release was become a common conveyance ; and the lease being expressly said to be, to enable the lessee to accept a release to other uses, should not be construed to any other intent, or to be to his own use, otherwise than to enable him to accept such release. Then if it should be admitted that the lease for 99 years were extinguished by the lease for a year, yet by the release it was revived ; for being but one conveyance, it was within the equity of the statute. The case of *Ferrers v. Fermor* was stronger ; and yet it was resolved there, that though the bargain and sale had destroyed the term for a time, yet by the recovery it was revived ; because then but one conveyance *ab initio* ; so here. Vide Tit. 32. c. 11. Ante, s. 40.

No judgment appears to have been given : but Lord C. B. Gilbert says it seemed reasonable that the lease for 99 years should not be merged, or at least but for a moiety ; and even in that case equity would set up the moiety, or the whole term again.

CHAP IV.

Modern Doctrine of Uses.

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| <p>SECT. 1. <i>Construction of the Statute.</i>
 3. <i>Contingent Uses.</i>
 4. <i>Uses arising on the Execution of Powers.</i>
 9. <i>Conveyances derived from the Statute of Uses.</i>
 15. <i>Whether the Statute extends to Devises.</i>
 19. <i>Resulting Uses.</i>
 35. <i>Uses by Implication.</i>
 38. <i>No Use results but to the Owner of the Estate.</i></p> | <p>SECT. 40. <i>Nor against the intent of the Parties.</i>
 44. <i>Which may be proved by parol Evidence.</i>
 45. <i>Nor which is inconsistent with the Estate limited.</i>
 50. <i>Nor on an Estate Tail, for Life or Years.</i>
 54. <i>Nor on a Devise.</i>
 55. <i>What Use results to a Tenant in Tail.</i></p> |
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SECTION I.

Construction of
the statute.
1 Rep. 129 b.

WHEN the statute of Uses first became a subject of discussion in the courts of law, it was held by the judges that no uses should be executed by that statute, which were limited against the rules of the common law. For it appeared from the preamble that it was the intent of the makers of the act to restore the ancient law, and to extirpate and extinguish such subtle practised feoffments, fines, recoveries, abuses and errors, tending to the subversion of the good and ancient common law of the land. So that it was plain this act was never intended to execute any use which was limited against the rules of the common law; the object of it was to extinguish and extirpate, not the feoffment, fine, or recovery, for these were laudable and good conveyances of lands and tenements, as in effect recited in the beginning of the preamble; but those uses, which were abuses and errors, therefore mischievous, because they were against the rules of the common law. The statute was a law of restitution, namely, to restore the good ancient common law, which was in a manner subverted by

abusive and erroneous uses; not to give more privilege to the execution of uses than to estates which were executed by the common law.

2. The Courts have so far adhered to this construction of the statute that the same technical words of limitation are now required in the creation of estates, through the medium of uses, as in the creation of estates at common law. But in many other instances this doctrine was departed from; and advantage was taken of an expression in the statute of Uses, in order to support several of those modifications of property which had been allowed by the Court of Chancery in declarations of uses; when they were distinct from the legal estate. 1 Rep. 87 b.
1 Atk. 591.

3. The statute of Uses enacts that the estate of the feoffees to uses shall be vested in the *cestuis que use*, "after such quality, manner, form, and condition, as they had before in or to the use, confidence or trust that was in them." Now the Court of Chancery having permitted a limitation of a use in fee or in tail to arise *in futuro*, without any preceding estate of freehold to support it; and also that a use might change from one person to another, by matter *ex post facto*, though the first use were limited in fee; the courts of law, in process of time, admitted of limitations of this kind, in conveyances to uses; and held that in such cases the statute would transfer the possession to the *cestui que use* after such quality, form, and condition, as he had in the use. An account of the nature of these limitations will be given in Title XVI. *Remainder*. Contingent uses.
Ante, c. 2. s. 37.

4. By the rules of the common law, no restriction or qualification could be annexed to a conveyance of lands, except a condition. In consequence of this principle, a fine or feoffment, with a power of revocation annexed to it, was void at common law; because the fine or feoffment transferred the whole property and right of disposal to the cognizee or feoffee; therefore the power of revocation being repugnant to the force and effect of the preceding words, was void. Besides the admission of such a clause would have introduced a double power, vested in different persons, over the same property; which was contrary to the rules of the common law. Uses arising on the execution of powers.
1 Inst. 237. a.

5. We have, however, seen that before the statute of Uses, if a feoffment was made to uses, the feoffor might reserve a power, either to himself, or to some other person, to revoke the uses *Ante*, c. 2. s. 38.

declared on the feoffment, and to appoint the feoffees to stand seised to other uses. The principle on which uses were originally founded being, that the feoffee to uses was bound in conscience to pursue the directions of the feoffor, this obligation was equally binding, whether the agreement was that the feoffor should receive the rents and profits himself, or some stranger; or whether they were to be paid in such manner as the feoffor, or any other person to whom he delegated his power, should at any future time appoint.

6. Now, as the statute of Uses vests the legal estate in the *cestui que use*, after such quality, manner and form, as he had in the use; the courts of law concluded that in all conveyances to uses, a power might be reserved of revoking a former limitation of a use, and of appointing a new use to some other person.

1 Inst. 237. a.

7. In an opinion of the late Mr. Booth, which has been published by Mr. Hilliard at the end of Sheppard's Touchstone, is the following account of contingent uses and powers:—"By the old law, no fee simple could be limited upon or after a fee simple: but, since the Statute of Uses, executory fees by way of use have not only been allowed, but are become frequent, in all conveyances operating by way of transmutation of possession. The uses are served out of the seisin of the feoffees, grantees, releasees, &c. In all future or executory uses there is, the instant they come *in esse*, a sufficient degree of seisin supposed to be left (a) in the feoffees, grantees, &c. to knit itself to and support those uses; so as that it may be truly said the feoffees or grantees stand seised to those uses; and then, by force of the statute, the *cestui que use* is immediately put into the actual possession. It is wholly immaterial how, or by what means, the future use comes *in esse*: whether by means of some event provided for, in case it happened in the creation of the uses, which event may be called the act of God; or by means of some work performed by any certain person, for which provision was likewise made in the creation of the uses, which may be called the act of man. In either case the statute operates the same way; for the instant the future use comes *in esse*, either by the act of God or the act of man, the statute executes the possession to the use, and the

(a) [This observation involves the doctrine of *Scintilla Juris*, which is discussed in a future page. Vol. II. Title. 16. ch. 5, 6, 7, &c.]

cestui que use is deemed to have the same estate in the land, as is marked out in the use, by the deed that created it. When the use arises from an event provided for by the deed, it is called a future, a contingent, an executory use: when it arises from the act of some agent or person nominated in the deed, it is called a use arising from the execution of a power. In truth, both are future or contingent uses, till the act is done; and afterwards they are, by the operation of the statute, actual estates. But till done, they are in suspense, the one depending on the will of heaven, whether the event shall happen or not; the other on the will of man."

8. If a person conveys his estate by lease and release to trustees and their heirs, to the use of himself for life, remainder to his first and other sons in tail, and inserts a proviso in the release that it shall be lawful for him, at any future time, to revoke these uses, and to declare new ones; and that immediately upon such revocation and new declaration the trustees shall stand seised of the lands to the use of such persons as the settlor shall appoint; this is a power of revocation and appointment. As soon as it is executed, the uses originally limited cease, and a new use immediately arises to the person named in the appointment, for such estate as is given to him by it; and the statute transfers the legal estate to such appointee, who by that means acquires the actual seisin and possession.

The nature of revocations and appointments to uses will be explained hereafter. Tit. 32. c. 13.

9. Lord Bacon says, the chief object of the Statute of Uses was to destroy all those secret conveyances to uses which had been so much complained of.—"The principal inconvenience (says he) which is *radix malorum*, is the diverting from the grounds and principles of the common law, by inventing a mean to transfer lands and inheritances without any solemnity or act notorious; so as the whole statute is to be expounded strongly towards the extinguishment of all conveyances, whereby the freehold or inheritance may pass, without any new confections of deeds, executions of estate, or entries."—It is therefore somewhat singular that this statute, instead of having had that effect, has on the contrary given rise to several new modes of transferring lands, unknown to the simplicity of the common law, and of a more secret nature than feoffments to uses: so that, notwith-

Conveyances
derived from the
statute of uses.

Read, 33.

1 Atk. 591.

standing the great caution with which this statute was made, it has not answered the intention of the Legislature.

Read. 39.

10. Lord Bacon has, however, clearly proved, that the intention of the statute was only to destroy the estate of the feoffee to uses, by transferring it to the persons who were entitled to the use; and not to destroy the form of the conveyance to uses. I. Because the words of the statute are, "Where any person is seised, or *hereafter* shall be seised to any use," &c. II. In the same session in which this statute was made, it was enacted, that all bargains and sales to uses should be enrolled; which proved the intention of the Legislature, to leave the form of the conveyance, with the addition of a farther ceremony. III. By the twelfth section of the statute, it was provided that the king should not take any primer seisin, or other feudal profits, on account of any estate which should be executed by means of the statute, till the 1st of May, 1536. But that he should take the feudal profits for all uses which should become executed by the statute *after* that time.

Ante, c. 3. s. 35.

11. But whatever might have been the intention of the Legislature in passing this statute, it is certain that it has given rise to several new sorts of conveyances, which operate contrary to the rules of the common law: for it being soon observed that there was nothing in the statute to prevent the raising of uses, but only a provision that when a use was raised, the possession of the land should be transferred to such use, it was only necessary to raise a use, and the legal seisin and estate, together with the actual possession, became immediately vested in the *cestui que use*, without livery of seisin, entry, or attornment.

C. 9 & 10.

12. In consequence of this doctrine, it became customary to raise a use to the person to whom the lands were intended to be conveyed, and then the statute transferred the possession to the *cestui que use*. This was done in two different ways; first, by a conveyance which only transferred a use, and which is said to operate without any transmutation of possession, because the alteration of the legal seisin is effected by the mere operation of the statute. There are two modes of conveyance which operate in this manner: a bargain and sale to uses, and a covenant to stand seised to uses; of which an account will be given in Title XXXII. *Deed*.

13. The second mode of conveying lands through the medium

of uses, is effected in the following manner : The legal estate and possession is transferred by a feoffment, fine, or recovery, (a) to some indifferent person, who stands in the place of the ancient feoffee to uses ; a deed is then executed, reciting, that by such feoffment, fine, or recovery, the lands have been transferred to A. B., and declaring that such feoffment, fine, or recovery shall enure and operate, and that the feoffee, cognizee, or recoveror in such feoffment, fine, or recovery, shall be seised of such lands, to the use of a third person. Or else a deed is first executed, reciting that a fine or recovery is intended to be levied or suffered, or covenanting to levy a fine or to suffer a recovery, and declaring that these assurances, when completed, shall enure to the use of a third person.

14. In both these cases a use arises out of the seisin of the feoffee, cognizee, or recoveror, to the person to whom such use is declared, and the statute immediately transfers to that use the legal estate and actual possession. These latter assurances are said to operate by transmutation of possession, (b) because the legal seisin and estate is first transferred by some common law conveyance or assurance. They are usually called deeds to lead or declare the uses of a fine or recovery ; and will be treated of in Title XXXII. *Deed*.

15. As the Statute of Uses preceded the Statute of Wills, the former has been said not to extend to devises to uses. It is however observable that the words of that statute are,—“ Where any person, &c. is seised to the use of any other person by reason of any bargain, sale, &c. *will*, or otherwise.” Now, though at the time when the statute was made, the word *will* could only apply to wills of lands then devisable by custom, yet when the statute

Whether the statute extends to devises.

(a) [Before the recent stat. 3 & 4 Will. 4. c. 74.]

(b) [To the fine, feoffment, and recovery may be added the ordinary conveyances of Lease and Release, and Grant, both of which operate by transmutation of possession or seisin ; the author treats of them in Vol. IV. Title Deed. ch. 4. s. 33. and ch. 11.]

The student is referred to the two tables in the following note, which may assist him in understanding the effect of the statute of uses, in the various forms of conveyance which do, and which do not operate by transmutation of possession or seisin ; the intantion being, in the following example (Table, No. 1.), that, under each of these modes of conveyance, the seisin should be transferred to A., the use or legal estate to B., and the trust estate or equitable ownership to C., so that they may take the same interest, or stand in the same character in each conveyance.

In the table No. 2. the student will see the different effects of the statute upon the interests of the persons taking under a limitation to A. and his heirs, to

of wills passed, the word *will* in the statute of uses became applicable to wills, or rather to devises, of all the lands over which a testamentary power was given.

the use of B. and his heirs, to the use of or in trust for C. and his heirs, by a declaration of the uses of a fine or recovery, by a feoffment, lease and release, grant, bargain and sale, covenant to stand seised, and an appointment.]

No. 1.

In order to give	A. the seisin,	B. the use or legal estate.	C. the trust estate, or equitable ownership.	
In a Fine	A. must be made Conusee,	B. Cestui-qui use by the deed leading or declaring the uses of the fine.	C. Cestui-qui trust.	Operating by transmutation of the seisin or possession at common law.
Recovery,	Recoveror,	the same of the recovery.	the same as above.	
Feoffment,	Feoffee,	Cestui-qui use.	Cestui-qui trust.	
Lease and Release,	Releasee, who is of course the lessee or bargainee for a year.	same.	same.	
Grant,	Grantee,	same.	same.	
Bargain and Sale, }	Bargainor.	Bargainee.	same.	Not operating by transmutation of seisin or possession.
Covenant to stand seised. }	Covenantor,	Covenantee being cestui-qui use.	same.	
Appointment.	The Releasee, grantee, &c. to uses in the deed creating the power of appointment.	Appointee.	same.	

16. In a case in 2 & 3 Phil. and Mary, it is said that devises of land in use have been common. In 23 Eliz. it was agreed by the Court of Wards, that a devise might be to the use of another; and Lord Coke is there reported to have been of opinion, that the son of a devisor takes by descent, when the *cestui que use*, to whom the land is devised, refuses the use; for the devisee cannot take it to his own use, because, if the use be void, the devise is also void. In the case of *Broughton v. Langley*, which will be stated in the next Title, it was agreed that a devise may be

Dyer 127. a.
E. Hartop's
case,
1 Leon. 253.

Lutw. 823.

No. 2.

	To A. and his heirs.	To the use of B. and his heirs.	To the use of, or in trust for C. and his heirs.	Operating by transmutation of seisin or possession.
In a Fine } Recovery. }	A. will take the use.	B. nothing.	C. the equitable fee.	
	A. will take the same as above.	B. nothing.	C. same as above.	
Feoffment.	A. will take the <i>seisin</i> .	B. the use.	C. same as above.	
Lease and Re- } lease. }	the same	as	above.	
Grant.	the same	as	above.	Not operating by transmutation of seisin or possession.
Bargain and } Sale. }	A. will take the <i>use</i> .	B. nothing.	C. the equitable fee.	
Covenant to } stand seised. }	the same	as	above.	
Appointment.	the same	as	above.	

The preceding Tables were inserted by the Editor in his edition of *Watkin's Principles*. 1831, pp. 233, 234.

Pa. 281.

to the use of another ; and the use will be executed, if the intent of the devisor appear. In Gilbert's Uses, it is also said that a devise may be made to a use.

Tit. 16. c. 5.

17. In the case of an immediate devise to uses, as a devise to the use of A. for life, remainder to the use of B. in tail, it is admitted that the remainder cannot take effect by way of use, because there is no seisin to serve the use. But in the case of a devise to A. and his heirs, to the use of B. for life, remainder to the first and other sons of B. in tail, there is no reason why the seisin of A. should not be deemed sufficient to support the uses to the sons of B.

Collect. Jur.
v. 1. 427.1 Inst. 271. b.
n. 1. s. 3. 5.

18. In opposition to this doctrine, a note to an opinion of the late Mr. Booth's has been published, in which it is said that the statute of uses does not operate on a devise to uses. This note is not annexed to the original opinion, which was in the possession of the late Mr. Hilliard, though it is said by Mr. Butler to be annexed to two copies of the opinion made immediately under the eye of Mr. Booth, and delivered by him to the persons in whose custody they are, and also in a copy of it bequeathed by Mr. Booth to Mr. Holliday. Admitting the authenticity of this note, and the great authority to which Mr. Booth's opinions are justly entitled ; yet, as it has been an universal practice for the two last centuries to devise lands to trustees and their heirs, to various uses, with several powers, in the same words as are used in declarations of uses on fines and recoveries ; it would be extremely dangerous at this time to question the operation of the statute of uses in such cases. (a)

Resulting uses.

Dyer 186. b.
11 Mod. 182.

19. Before the statute of Uses, if a person had conveyed his lands to another, without any consideration, or declaration of the uses of such conveyance, he became entitled to the use or pernanacy of the profits of the lands thus conveyed. This doctrine was not altered by that statute ; and, therefore, it became an established principle, that where the legal seisin and possession of lands is transferred by any common law conveyance or assurance, and no use is expressly declared, nor any consideration or

(a) [In the construction of wills the intention of the testator must be the guide, and it is now well settled, that if it be apparent, from the technical poaning of the devise, that the testator intended to bring the statute of 27 Hen. 8. c. 10. into operation, effect will be given to that intention, and the uses will be executed in the will as if they were limited by deed. 1 Vern. 79. 415. 2 Salk. 679. 2 Atk. 573. 2 P. Will. 134.]

evidence of intent, to direct the use ; such use shall result back to the original owner of the estate ; for where there is neither consideration, nor declaration of uses, nor any circumstance to shew the intention of the parties, it cannot be supposed that the estate was intended to be given away.

20. In consequence of this principle, Lord Coke has laid it down as a rule—" That so much of the use as the owner of the land does not dispose of, remains in him." So that where a person seised in fee simple [before the recent stat. 3 & 4 Will. 4. c. 74.], levied a fine, or suffered a recovery, without any consideration, or declaration of the uses to which it should enure, the use resulted back to himself; and the statute immediately transferred the legal estate to such resulting use ; by which means he was seised in fee simple in the same manner as he was before. If any particular uses were declared, so much of the old use as was not declared to be vested in some other persons, resulted back to the original owner.

1 Inst. 23. a.
271. a.
Dyer 166. a.

21. Thus, where a man made a feoffment to the use of such person or persons, and for such estate and estates, as he should appoint by his will ; it was resolved that the use resulted to the feoffor till he made an appointment.

Sir E. Clere's
case, 6 Rep.
17. b.

22. So where a person made a feoffment to the use of himself, and his intended wife, after their marriage ; it was determined that the use resulted to the feoffor and his heirs, till the marriage.

Woodliffe v.
Drury, Cro.
Eliz. 439.

23. In an ejectment tried before Lord Chief Baron Parker, this short case was reserved for the opinion of the Court. A. B., being in possession of the lands in question, levied a fine *sur conusans de droit come ceo*, &c. to the conusee and his heirs, without any consideration expressed ; and without declaring any use thereof : nor was it proved that the conusee was ever in possession. So that the single question was, whether the fine should enure to the use of the conusor, or to that of the conusee. After two arguments, the Court gave judgment for the plaintiff, who claimed as heir of the conusor ; and said, that in the case of a fine *come ceo*, &c. where no uses were declared, whether the conusor were in possession, or the fine were of a reversion, it should enure to the old uses, and the conusor should be in of the old use. That in the case of a recovery suffered, the same should enure to the use of him who suffered it (who was com-

Armstrong v.
Wholesey,
2 Wils. R. 19.

monly the vouchee), if no uses were declared. So in this case the ancient use was in the conusor at the time of levying the fine; for it seemed to have been long settled, that a fine without any consideration, or uses thereof declared, should enure to the ancient use, in whomsoever it was, at the time of levying the fine; and as it was here in the conusor, at the time, the judgment must be for the plaintiff.

Beckwith's
case. 2 Rep.
58. a.
Dyer 146. b.

24. Where a husband and wife levied a fine of the wife's estate, without any sufficient declaration of uses, it was held that the use resulted back to the wife only; because the estate in the land passed only from her, and the husband joined with her only for conformity.

25. Where a person levied a fine of his estate to trustees, to certain uses, and did not declare any use of the estate during his own life, it would result to himself.

Penhay v.
Hurrell,
2 Vern. 370.
2 Freem. 258.

26. A fine was levied to the use of trustees for 700 years, remainder to other trustees for 300 years, and from and after the death of the cognizor, to the use of his son for life, remainder to the first and other sons of such son in tail. It was resolved by the Lord Keeper, after consideration had with all the Judges, and a case, that as the cognizor had not limited away the freehold to any person during his life, it resulted back to himself.

Wills v. Palmer,
2 Black. R. 687.
Ferne. Cont.
Rem. 45. 6th
edit.

27. Archdale Palmer, in consideration of the marriage of his son, settled an estate to the use of his son for life, remainder to his intended wife for life, remainder to the first and other sons of the marriage in tail, remainder to the heirs male of the body of Archdale Palmer, remainder over. It was resolved, that as the limitations to the son, and his first and other sons, might determine during the life of Archdale Palmer, a use resulted to him for life, expectant upon the determination of the estates limited to his son, &c.

28. But where the use is expressly limited away during the life of the grantor, no use can result to him.

Tippin v. Coson,
4 Mod. 380.
1 Ld. Raym. 33.

29. A person, in consideration of marriage, conveyed lands to trustees, to the use of himself and his heirs till the marriage, then to the use of his intended wife for life for her jointure, remainder to trustees and their heirs during the life of the husband, in trust to support contingent remainders, but to permit the husband to receive the rents and profits during his life, re-

remainder to the first and other sons of the marriage in tail male, remainder to the heirs male of the husband by his then intended wife, remainder over. It was resolved that no use resulted to the husband, because there was an express estate limited to the trustees during his life.

30. The use will result according to the estate which the parties have in the land. Thus if there were two joint tenants, and they levied a fine without any declaration of uses, the use should be to them of the same estate as they before had in the land. So if A., tenant for life, and B. in remainder or reversion, levied a fine generally, the use should be to A. for life, the remainder or reversion to B. in fee. For each granted that which he might lawfully grant; and each shall have the use which the law vested in them, according to the estate which they conveyed over. So if A. seised in fee of an acre of land, and he and B. levied a fine of it to another, without consideration, the use would be to A. only and his heirs: for a use, which is but a trust and confidence, and a thing in equity and conscience, shall be by operation of law to him who in truth was owner of the land, without having regard to estoppels or conclusions, which are averse from truth and equity. 2 Rep. 58. a.

31. It was determined in a modern case, where a fine was levied by a tenant for life, together with the remainder-man in tail, and the reversioner in fee, and a declaration of uses was executed by the tenant for life, and the remainder-man in tail only, that the use of the reversion in fee resulted to the reversioner. Roe v. Popham,
Doug. Rep. 24.

32. It is somewhat doubtful, whether in the case of a lease and release, without any declaration of uses, the use results to the releasor, for reasons which will be stated when that mode of conveyance is explained. But if any particular use is declared on a lease and release, the residue of the use will result back to the releasor. Vide Tit. 32. c.
11.

33. Where the same use is limited to the owner of the estate, which would have resulted to him in case no declaration of that use had been made, the declaration is void; and he takes it as a resulting use. 1 Inst. 22. b.

34. Anthony Mitford being seised in fee of the estate in question, conveyed the same to the use of his eldest son and his wife, and the heirs male of the body of his son, remainder to the use of Read and Morpeth, v. Errington, Cro. Eliz. 321.

Moo. 284.
2 Rep. 91. b.

his own right heirs. It was resolved, that the use limited to the right heirs of Mitford was the ancient use, which was never out of him; and was in fact a reversion in him to grant or charge; and would descend from him to his heir if it had not been mentioned: that the limitation to his right heirs was therefore void, (b) being no more than what the law had already vested in him.

Uses by implication.

35. The rule that so much of the use as the owner of the land does not dispose of remains in him, takes place in those conveyances, to uses which operate without transmutation of possession, as in covenants to stand seised, and bargains and sales, where the use arises out of the estate of the covenantor or bargainer: for in these cases so much of the use as the covenantor or bargainer does not dispose of still remains in him, as his old estate; and is called a use by implication.

Pybus v. Mitford, 1 Vent. 327.

36. A. being tenant in fee, covenanted to stand seised to the use of his heirs male, begotten, or to be begotten on the body of his second wife. It was determined that A. took an estate for life by implication: for the limitation being to the heirs of his body, &c. and it being impossible for him to have any such heirs during his life, as *nemo est heres viventis*, the use was undisposed of during his life, consequently remained in him.

Tit. 32. c. 10.

37. It follows from the same principle, that where no use arises upon a covenant to stand seised, or bargain and sale, either for want of a sufficient consideration, or for any other cause, such use will remain in the covenantor or bargainer.

No use results but to the owner of the estate.

38. From the nature of resulting uses, and uses by implication, it follows that they can never arise to any person but the original owner of the estate.

Davis v. Speed, Show. Ca. in Parl. 104.

39. Husband and wife levied a fine of the wife's estate to the

(b) [The recent statute of 3 & 4 Will. 4. c. 106. s. 3. materially alters the law in this respect, so far as regards limitations in deeds executed after the 31st day of December, 1833, and in wills of testators dying after that day. For it enacts, that when any land shall have been limited by any assurance executed after the said day, to the person or to the heirs of the person who shall thereby have conveyed the land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.]

In respect of wills, it enacts, that when any land shall have been devised by any testator (dying after the said day), to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent.]

use of the heirs of the body of the husband on the wife begotten; remainder to the husband in fee. It was resolved, that no estate resulted to the husband, because the lands originally belonged to the wife. This judgment was affirmed by the House of Lords.

Ante, s. 24.

40. Where there is any circumstance to shew the intent of the parties to have been that the use should not result, it will remain in the persons to whom the legal estate is limited.

Nor against the intent of the parties.

41. A recovery was suffered by one Hummerston, to the intent that the recoveror should make an estate to him and his wife for their lives, remainder to their eldest son in tail, &c. It was agreed by the Court, that after the recovery suffered, the recoverors should be seised to their own use; for if they were seised to the use of Hummerston, then they could not make the estate. But Southcot and Wray said they ought to do this in convenient time, otherwise the use would result to Hummerston.

Hummerston's case, Dyer, 166. a. n. 9.

42. A fine was levied, and an indenture made to declare the uses of it; the words of which were, "the fine was levied to the intent that they should make an estate to him whom J. E. the father (who was the cognizor,) should name." And there was a proviso at the end of the indenture, that the cognizee should not be seised to any other use, except unto that use specified. It was holden by all the justices, that the lands should be to the use of the cognizees themselves, immediately as above: that after the nomination, they should be seised to the use of whomever he named; and if J. E. died without nomination, then the law would settle the use in his heir.

Idem.

43. A feoffment was made by A. upon condition to re-convey to A. for life, remainder to the eldest son of A. in fee. It was resolved, that no use resulted to A.; for if so, then the estate would vest by the Statute of Uses, and the feoffee could not make an estate to A. and to his son.

Winnington's case, Jenk. Cent. 6. Ca. 44. *Vide* Altham v. Anglesey. Throut v. Peake, Tit. 86. c. 2.

44. As resulting uses depend upon the intention of the parties, parol evidence is admissible to shew what the intent was: and the clause in the statute of Frauds, requiring that declarations of trusts and confidences, which is held to include uses, should be made by some writing, signed by the party, extends, in cases of conveyances to uses, to third persons only; not to the persons conveying, or those to whom lands are conveyed to uses.

Which may be proved by parol evidence.

Roe v. Popham, Doug. 25. 11 Mod. 214. Tit. 32. c. 3.

Nor which is inconsistent with the estate limited.

Dyer, 111. b. n. 46.

Idem.

Adams v. Savage, 2 Salk. 679.

Rawley v. Holland. 2 Ab. Eq. 753. 22 Vin. Ab. 188. pl. 11.

Nor on an estate tail, for life, or years.

Bro. Ab. Feoff. al. Use. pl. 10. Dyer, 146. b. Perk. 534, 5.

45. Where a use is expressly limited to the owner of the estate, he will not be allowed to take any resulting or implied use, inconsistent with the use limited to him.

46. At a moot in Lincoln's Inn Hall, Mr. Noy put this difference:—If a man makes a feoffment in fee to the use of himself for life, the fee simple remains in the feoffees, for otherwise he will not have an estate for life, according to his intention: but if the use be limited to himself in tail, it is otherwise; for both estates may be in him.

47. It was held in the Court of Wards by Popham and Anderson, in the argument of the Earl of Bedford's case, that if A. makes a feoffment to the use of himself for 40 years, and does not limit any other estate, the fee will not result, but will remain in the feoffees; for otherwise the term would be merged.

48. One Savage being seised in fee, conveyed his estate, by lease and release, to trustees and their heirs, to the use of himself for 99 years, remainder to trustees for 25 years, remainder to the heirs male of his own body. It was determined that no use for life resulted to Savage, because that would be inconsistent with the term of 99 years expressly limited to him.

49. A., by a settlement made on his marriage, conveyed certain lands to the use of himself for 99 years, if he so long lived, and after to the use of trustees for 200 years, remainder to the use of the heirs male of his own body, remainder to his own right heirs. Upon a case referred to the Judges of the Court of Common Pleas, from the Court of Chancery, they held that no estate of freehold could result to A. for his life, because another estate, viz. for 99 years, if he so long lived, was expressly limited to him, which would be inconsistent with a resulting estate of freehold.

50. The doctrine of resulting uses only extends to those cases where an estate in fee simple passes: for if a person conveys an estate to another in tail, without any consideration, or declaration of uses, no use will result to the donor, and consequently the donee will hold to his own use; because by a gift of this kind there is a tenure created between the donor and the donee in tail, which amounts to a consideration, and prevents the use from resulting. In the same manner as if a feoffment had been made before the statute of *Quia Emptores*, the feoffee would have held the land to his own use, because a tenure was thereby

created, in consequence of which he would have held of the feoffor, at least by fealty.

51. In the same manner, if a person leases lands to another *Idem.* for life, or years, no use will result to the lessor. So if a lessee for life or years grants over his estate, without any declaration of use, the grantee will have it to his own use. In Gilbert's Uses, p.65. the reason given for this doctrine is, that these lesser estates were not used to be delivered, to be kept for the future support and provision of the family; therefore the mere act of delivering possession passed a right, without consideration; since there was no presumption, from the use of the country, that these estates were transferred under secret trusts; especially as rents were usually reserved; and they were subject to waste and other forfeitures.

52. In the case of a conveyance of an estate for life or years, without consideration, although a use should be declared of part of the estate to the grantee, yet there will be no resulting use to the grantor.

53. A. being a tenant for life, granted his estate to B. by fine, and by indenture declared the use to B. for the life of A. and B.; and if B. died, living A., that it should remain to C. Afterwards B. died, living A.; C. entered and let to D. for years, and died, living A. The question was, whether the lessee should retain the land as an occupant, during the life of A., or that A. should have it again as a resulting use. *Castle v. Dod, Cro. Ja. 200.*

“ It was adjudged, after argument, that D. should have it as an occupant, and that A. had not any residue of the use in him: for although where tenant in fee makes a deed of feoffment, and limits the use for life or in tail, and doth not speak of the residue, it shall be to the feoffor or conusor, because he had the ancient use in him in fee; yet when tenant for life, or he who hath the particular estate, grants his estate by fine, and limits the use for years, or for a particular estate, it shall not return to him, but be to the conusee, although the fine were without any consideration; because he who hath the particular estate by fine is subject to the ancient rent and forfeiture, which is a sufficient consideration to convey the estate to him.”

54. As a devise imports a bounty, it follows that it must be to the use of the devisee, if not otherwise declared; and that no use can, in any case, result to the heirs of the devisor, unless it ap- *Nor on a devise. Tit. 38. c. 1.*

pears by the will itself that the devise was not made to the use of the devisee. But if a person be merely named as a devisee to uses, and the use fails, there will be a resulting use to the heir of the devisor.

Hartop's case,
1 Leon. 254.

What use results
to a tenant in
tail. Tit. 36.
c. 7.

55. Where a tenant in tail suffered a common recovery of his estate, by which it was converted into a fee simple, without declaring any uses thereof, it has been doubted whether the use which resulted to him be in tail or in fee simple. The language of the old books is, that where there is a feoffment, fine, or recovery, without consideration or declaration of uses, these assurances shall enure to the old uses.

Argol v. Cheney, Latch, 82.
Harris v. Evans,
Bridg. 548.

56. Thus where a father tenant for life, and the son tenant in tail, joined in suffering a common recovery, but the father alone executed the deed declaring the uses; the court directed the jury to find the uses according to the estates which the parties had at the time of suffering the recovery.

Waker v. Snow,
Palm. 359.

57. So where a father tenant for life, and the son tenant in tail, suffered a common recovery, without any declaration of the uses to which it should enure; it was held that it enured to the former uses.

9 Rep. 11. a.

58. The doctrine laid down in the above cases is liable to great objections; for as resulting uses are guided by the intent of the parties, it follows that where a tenant in tail suffered a recovery without any declaration of uses, the presumption was, that this act was done for the special purpose of acquiring the absolute dominion over his estate; as it cannot be supposed that he would go to the expense of suffering a recovery, if he was only to take the same estate which he had before: and it has been admitted in the following case, that where a tenant in tail suffered a common recovery without any declaration of uses, the resulting use was to him in fee simple.

Gilb. Uses. 64.

Nightingale v.
Ferrers,
3 P. Wms. 207.

59. Earl Ferrers being tenant for life, with remainder to his first and other sons in tail male, and having an eldest son Robert who was about 17 years old, and several other sons, a very advantageous match had been agreed on between such eldest son and a young lady; and articles were entered into by Earl Ferrers and his son, whereby Earl Ferrers covenanted that he and his son should, within a year after his son came of age, by fine or recovery, settle the bulk of his estate to the use of his son for life, remainder to his first and other sons in tail, &c. The marriage

took effect ; and the eldest son Robert, when he came of age, joined with his father in levying a fine and suffering a common recovery : but there was no declaration of uses. The son died, leaving an only daughter and no son.

It appears from the case that the estates of which the recovery was suffered, descended to the only daughter of Robert the son, who had joined his father in the recovery, and had not declared any uses. Now, if the recovery had enured, as to Robert the son's estate, to the old uses, he would have been tenant in tail male, with remainder to his brothers in tail male successively ; and upon his death without issue male, the estate would have vested in his next brother, not in his daughter. But it was so fully admitted by the counsel of Earl Ferrers, who was party to that suit, and who was a younger brother of Robert the son, who suffered the recovery, that in case of no declaration of uses, the use and estate resulted to Robert the son in fee ; that the only point for which they contended was, that the articles executed by Robert the son, while an infant, and under which they claimed, amounted to a good declaration of the uses of the recovery.

60. This doctrine has been confirmed by the highest modern authorities. Thus Lord Hardwicke has said, " I take it for law ^{1 Atk. 9.} that a tenant in tail suffering a recovery is in of the old use, and that the estate is discharged of the statute *De Donis*:" and in another case, " A common recovery will bar the entail, though ^{3 Atk. 313.} there is no deed to lead the uses ; because it is in respect of the satisfaction of estate in value, which creates the bar." And Lord C. J. Lee has said, " It is the use of the fee simple that ^{6 T. R. 110. note.} passes to the recoveror from tenant in tail, and which results to him and his heirs, if no use is declared."

61. It follows from the above principles, that where a tenant in tail levied a fine, without any declaration of uses, he acquired a base fee descendible to his heirs, as long as he had heirs of his body ; and in the case of *Roe v. Popham* it must be presumed ^{*Ante*, s. 44.} that the Court reasoned in this manner ; for upon the death of the tenant in tail without issue, the person who had the reversion in fee was held to be entitled to the estate.

TITLE XII.

T R U S T.

CHAP. I.

Origin and Nature of Trust Estates.

CHAP. II.

Rules by which Trust Estates of Freehold are governed.

CHAP. III.

Rules by which Trust Terms are governed.

CHAP. IV.

Estate and Duty of Trustees.

CHAP. I.

*Origin and Nature of Trust Estates.*SECT. 1. *Origin of Trusts.*

- 2. *Description of.*
- 4. *A Use limited upon a Use.*
- 14. *Limitation to Trustees to pay over the Rents.*
- 16. *Trust for the separate use of a Woman.*
- 21. *Trust to sell or to raise Money.*
- 25. *Or for any other Purpose to which a [legal Estate or] seisin is necessary.*
- 34. *A Trust Estate limited after payment of Debts, vests immediately.*
- 35. *Terms for Years limited in Trust.*
- 36. *How Trusts may be declared.*
- 40. *Resulting or implied Trusts.*
- 41. *Contract for a Purchase.*
- 42. *Purchase in the Name of a Stranger.*
- 48. *Purchase with Trust Money.*
- 52. *Conveyance without Consideration.*

SECT. 55. *A Trust declared in part.*

- 57. *Or which cannot take effect.*
- 59. *Exception.*
- 61. *Where no Appointment is made.*
- 62. *Renewal of a Lease by a Trustee.*
- 64. *Or by Persons having only a particular Estate.*
- 66. *Where there is Fraud.*
- 67. *Trusts of Copyholds.*
- 73. *A Purchase in the Name of a Child is an Advancement.*
- 81. *Exception. Children emancipated.*
- 83. *And also a Wife.*
- 86. *No Trust between a Lessor and Lessee.*
- 87. *Trusts [executed distinguished from Trusts] Executory.*
- 89. *Who may be Trustees.*

SECTION I.

THE object and intention of the statute 27 Hen. 8. certainly was, to destroy that double property in land, which had been introduced into the English law by the invention of uses. If, therefore, the intention of the Legislature had been carried into full effect, no use could ever after have existed for more than an instant; for the moment a use was created, the statute would have transferred the legal seisin and possession to such use. But the strict construction which the Judges put on that statute defeated, in a great measure, its effect; as they determined that there were some uses to which the statute did not transfer the possession; so that uses were not entirely abolished, but still continued separate and distinct from the legal estate, and were taken notice of and supported by the Court of Chancery, under the name of Trusts.

Origin of Trusts.

Vaugh. 50.
1 Atk. 591.

2. A trust is, therefore, a use not executed by the statute 27 Hen. 8.; for originally the words *use* and *trust* were perfectly synonymous, and are both mentioned in the statute. But as the provisions of the statute were not deemed co-extensive with the various modes of creating uses, such uses as were not provided for by the statute were left to their former jurisdiction.

1 Black. Rep. 136.

3. A trust estate may be described to be a right in equity to take the rents and profits of lands, whereof the legal estate is vested in some other person; to compel the person thus seised of the legal estate, who is called the trustee, to execute such conveyances of the land as the person entitled to the profits, who is called the *Cestui que trust*, shall direct, and to defend the title to the land. In the mean time the *cestui que trust*, when in possession, is considered in a court of law, as tenant at will to the trustee.

Description of.

1 Show. R. 73.

4. There are three direct modes of creating a trust. The first arises from a rule established in 4 & 5 Phil. & Mary, that a use could not be limited on a use. The reason given by Lord Bacon for this determination is, because the words of the statute are, — Where any person is seised of any *lands or tenements* to the use of any other person, which exclude uses, as they do not fall within either of those descriptions.

A use limited upon a use.

Tyrrill's case, Dyer, 155. a. Read. 43.

2 Comm. 336.

5. Thus, on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, it was held that the statute executed only the first use; and that the second was a mere nullity. But as it was evident that B. was not intended to be benefited by that conveyance, the Court of Chancery took cognizance of the case, and decreed that B. should pay the rents and profits of the land to C., and execute such conveyances as he should direct.

Wheatstone v.
Bury,
2 P. Wms. 146.
Wagstaff v.
Wagstaff,
Tit. 38. c. 5.
Doe v. Passing-
ham, 6 B. & Cr.
305.

Att. Gen. v.
Scott, Forrest
R. 138.

6. In a settlement, lands were conveyed to trustees and their heirs, to the use of them and their heirs, to the use of A. B. for life, &c. It was held that the legal estate was vested in the trustees, and that the limitations to A. B., &c. were but trusts.

7. Ann Ratford conveyed lands to T. B. and his heirs, to the use of him and his heirs, in trust to permit the said Ann and her husband to receive the profits during their lives. Lord Talbot held, that as the estate was limited to trustees and their heirs, to the use of them and their heirs, so that it was actually executed in them, whatever came afterwards could be looked upon only as an equitable interest; for there could not be a use upon a use.

Hopkins v. H.
1 Atk. 581.
Marwood v.
Darrell, Ca.
Temp. Hard-
wicke, 91. S. P.

8. [In a case of devise the rule of construction was the same. Thus where a person devised his real estate to trustees and their heirs, to the use of them and their heirs, upon several trusts; it was declared by Lord Hardwick that the legal estate was vested in the trustees, and the subsequent devisees took only equitable interests.

Tit. 32. c. 10.
14.

9. Where lands are conveyed by covenant to stand seised, bargain and sale, or by appointment under a power to A. and his heirs, to the use of B. and his heirs, the legal estate will vest in A.; and B. will take only a trust or equitable estate; for in each of these instances, the conveyance does not operate by transmutation of the seisin to A., but merely passes the use to him, the seisin remaining in the bargainor, covenantor, and the releasee, &c. to uses in the instrument creating the power.

See the Tables,
supra, p 368. n.

7 T. R. 342.
438.

10. In Venables v. Morris, an estate was limited by deed and fine to the use of the husband for life, remainder to trustees and their heirs during his life to preserve contingent remainders; remainder to the wife for life, remainder to the trustees and their heirs (generally, without confining the limitation to the life of the wife), to preserve the contingent uses and estates thereafter

limited; remainder to such persons, &c., as the wife should appoint, &c. Upon a case sent by the Court of Chancery, the Court of King's Bench certified that the trustees took the legal estate in fee after the determination of the wife's life estate, and that all the subsequent limitations were trusts.

Lord Kenyon observes, upon the above case, that it was absolutely necessary that the trustees should take the legal fee, for the wife in exercise of her power of appointment might create contingent remainders, which would require the estate in the trustees to support them. 7 T. R. 437.

11. The case of *Doe v. Hicks*, which is one of devise, seems to have overruled *Boteler v. Allington*, and is distinguished from *Venables v. Morris*, in the material circumstance that there was no power of appointment. In *Doe v. Hicks*, the estate was devised to A. for life, to trustees and their heirs (generally) to preserve contingent remainders; to the first and other sons of A. successively in tail male; then followed limitations to several other tenants for life, to the trustees to preserve, and to the first and other sons in tail male as before, the limitations in every instance being to the trustees and their heirs (generally); with the ultimate limitation to the right heirs of the testator. The Court of King's Bench held that it was not necessary for the trustees to take the legal fee, and the intention of the testator appeared to be, that the estate limited to the trustees should be confined to the lives of the tenants for life; for if the testator did not intend this, all the subsequent limitations to the trustees were absolutely nugatory, and that the devise ought to be construed accordingly. 7 T. R. 433.
1 Br. C.C. 72.
ubi supra.

Nash v. Coates,
3 B. & Ald. 839.

12. But it has been decided in *Colmore v. Tyndall*, that in a deed, limitations, nearly resembling those in the above case of *Doe v. Hicks*, do not indicate an intention to give the trustees an estate *pur autre vie* so clearly, as to justify the court in confining the limitation to the trustees to the lives of the tenants for life. 2 Yo. & Jerv. 605.

In *Colmore v. Tyndall*, after several limitations in strict settlement, among which, those to the trustees to preserve were confined to the lives of the tenants for life, the estate was limited to Marianne Colmore for life; with a contingent life estate to her husband in case she married; remainder to the trustee and his heirs (generally) to preserve; remainder to her first and other

sons successively in tail male: then to Caroline Colmore for life, to her husband if she married, to the trustee and his heirs (generally) to preserve; to her first and other sons in tail male as before; with the remainder over in fee. Marianne Colmore died unmarried. The Court of Exchequer Chamber decided that the legal fee vested in the trustees, after the life estate of Caroline Colmore.

12 Ves. 89.

13. But where in a deed, the intention is apparent from the subsequent limitations, in order to give effect to which it becomes necessary to confine the limitation to the trustees during the life of the tenants for life, there such a construction will be adopted. To this principle the case of *Curtis v. Price*, must be referred: there the estate was by lease and release limited to the husband for life, to his wife for life, if she continued unmarried, if not, to trustees and their heirs (generally) upon trust to pay her an annuity out of the rents during her life for her separate use, and to apply the surplus for the benefit of the children of the marriage, and after the decease of husband and wife to the trustees, their executors, &c., for a term of 100 years, for raising portions for younger children, remainder to the heirs of the body of the wife by the husband, remainder to the right heirs of the husband. Sir William Grant, M. R., was of opinion that the limitation to the trustees should be confined to the life of the wife, because the term of 100 years could not arise consistently with the limitation of the entire fee to the same trustees.]

Limitations to
trustees to pay
over rents.
Bro. Ab. Tit.
Feoffm. al.
Use, 52.

14. The second mode of creating a trust, arose from an opinion delivered by the judges in 36 Hen. 8. that where a person made a feoffment in fee, to his own use, during his life, and after his decease, that I. N. should take the profits; this was a use in I. N.; contrary if he said that after his death his feoffees should take the profits, and deliver them to I. N. This would be no use in I. N. because he could have them only by the hand of the feoffees. Thus the feoffees would have the legal estate; and consequently I. N. could only have a trust, which would be enforced in equity.

A distinction has however been made between a devise to a person in trust, to pay over the rents and profits to another; and a devise to a person, in trust to permit another to receive the rents and profits. In the former case it was held that the legal estate should continue in the first devisee, in order that he might

be able to perform the trust: for where he is directed to pay over the rents and profits, he must necessarily receive them; but in the latter case it has been adjudged that the legal estate is vested, by the statute, in the person who is to receive the rents.

15. Lands were devised to trustees and their heirs, to the intent to permit A. to receive the rents for his life, &c. It was determined that this would have been a plain trust at common law; and what at common law was a trust of a freehold was executed by the statute; which mentioned the word trust, as well as use. And that the case of *Burchett v. Durdant*, which had been determined otherwise, was not law.

Broughton v. Langley,
2 *Ld. Raym.*
873.
Doe v. Biggs,
2 *Taunt.* 109.

2 *Vent.* 312.

16. Where an estate is devised to trustees, for the separate use of a woman; the courts will, if possible, construe the devise so as to vest the legal estate in the trustees; because such a construction will best effectuate the intention of the testator.

Trust for the
separate use of
a woman.

17. Lands were devised to trustees and their heirs, in trust for a married woman and her heirs; and that the trustees should from time to time pay and dispose of the rents to the said married woman, for her separate use. The court held it to be a trust only, and not a use executed by the statute.

Nevil v. Saunders,
1 *Vern.* 415.

18. A testator gave all the rents of certain lands to a married woman, during her life; to be paid by his executors into her own hands, without the intermeddling of her husband.

South v. Alleyne,
5 *Mod.* 63. 101.
1 *Salk.* 228.

Lord Chief Justice Holt was of opinion that the executors took the legal estate, as trustees for the wife: but the other judges were of a contrary opinion. Lord Holt's opinion was however fully established in the following case.

19. Lands were devised to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus rents into the proper hands of a married woman; and after her decease, that the trustees should stand seised to the use of the heirs of her body. It was decreed, that this was a use executed in the trustees during the life of the married woman; but that after her decease, the legal estate vested in the heirs of her body. This decree was affirmed by the House of Lords, after consulting the judges.

Say & Sele v. Jones,
1 *Ab. Eq.* 383.

3 *Bro. Parl. Ca.*
113.

20. In the preceding case, the direction to the trustees to pay annuities, and the trust to pay the surplus, would have justified the decree. But in a modern case sent out of Chancery, an estate was devised to trustees and their heirs, upon trust to

Harton v. Harton,
7 *Term R.* 662.

See 2 Swan.
391. per Lord
Eldon.

permit the testator's niece, who was married, to receive the rents during her life, for her separate use. Lord Kenyon said, that whether this were a use executed in the trustees or not must depend upon the intention of the devisor. This provision was made to secure to a feme covert a separate allowance, to effectuate which it was essentially necessary that the trustees should take the estate, with the use executed; for otherwise the husband would be entitled to receive the profits, and so defeat the object of the devisor. The Court certified that the legal estate, by way of use executed in fee simple, vested in the trustees; that construction being necessary to give legal effect to the testator's intention; to secure the beneficial interest to the separate use of the feme covert.

Trust to sell or
to raise money.

21. Where lands are devised to trustees, in trust to sell or mortgage them, in order to raise money for payment of debts, and subject thereto in trust for a third person, the trustees will take the legal estate; for otherwise it would not be in their power to execute the trust.

Bagshaw v.
Spencer,
1 Ves. 142.
Collect. Jur.
Vol. 1. 378.

22. A person devised all his lands to five trustees, their heirs and assigns, in trust that they and their heirs should in the first place, by the rents and profits, or by sale or mortgage of the premises, raise so much money as should be necessary for the payment of his debts; after payment thereof, he gave the same to his trustees for 500 years, without impeachment of waste, upon several trusts. And then proceeded in these words: "And from and after the determination of the said estate for years, then I give and devise all my said lands, &c. unto my said trustees, their heirs and assigns; my mind being, that my said trustees shall be and stand seised of the said premises in trust for the several uses, &c. after declared; viz. as for one moiety of the same premises I give and devise the same to the use and behoof of my nephew T. Bagshaw, for the term of his natural life, &c." One of the questions in this case was, whether the estate devised to the nephew was a legal or a trust estate.

Lord Hardwicke held that the devise to the nephew was merely a trust in equity; the first devise being to the trustees and their heirs, it carried the whole fee in point of law. Part of their trust was to sell the whole or a sufficient part for payment of debts. This would have carried a fee by construction without

the word heirs. The consequence of this was, that here being the whole fee, in law, devised to the trustees, no remainder of a legal estate could be limited upon it; and T. Bagshaw took only a trust.

Wright v. Pearson, Fearn, Cont. Rem. 187. 1 Eden, 119.

23. This mode of construction is adopted in cases of deeds, as well as in that of devises.

24. Lord Byron being tenant for life, with remainder to his son in tail, they suffered recoveries, and conveyed estates in Lancashire and Nottinghamshire to the use of trustees and their heirs, in trust to sell the Nottinghamshire estate for payment of debts. As to the Lancashire estate, in trust to sell it, and to apply the money in the purchase of other lands, to be settled on Lord Byron for life, remainder to his son in fee. With a proviso that the rents should, till sale, be received by the persons who would have been entitled to them, if no recovery had been suffered.

Keene v. Deardon, 8 East, 248.

It was held that the use of the Lancashire estate was executed in the trustees: that as to the proviso that the rents, till sale, should be received as before, that was nothing more than the common provision in such cases, and did not carry the legal estate.

25. It is now settled that where an estate is devised to one, for the benefit of another, the courts will execute the use in the first or second devisee, as appears best to suit the intention of the testator, from which it follows that whenever an estate is devised to trustees, with a requisition to do any act, to which the seisin and possession of the legal estate is necessary, although they be directed to permit the rents and profits to be received by another person, still that person will only be entitled to a trust estate; for otherwise the trustees would not be able to execute the trust.

Or for any other purpose to which a seisin is necessary.

Fearn's Op. 422.

26. J. B. devised all his real and personal estate to three trustees, their heirs and assigns, in trust to pay his son Isaac 37*l.* quarterly; and if he married with consent, then double the sum: if he should have any children, he gave the residue of the rents of his said trust estate, to be applied, during the life of his son, for the education of such child or children: he then gave one moiety of the trust estate to such child or children of his son as he should leave, and the other moiety to the child or children of his grandson J. D.

Chapman v. Blisset, Forrest, R. 145.

Lord Talbot said, the whole depended on the testator's intent, as to the continuance of the estate devised to the trustees; whether he intended the whole legal estate to continue in them, or whether only for a particular time or purpose. If an estate were limited to A. and his heirs, in trust for B. and his heirs, there it is executed in B. and his heirs. But where particular things are to be done by the trustees; as in this case, the several payments that were to be made to the several persons; it was necessary that the estate should remain in them; so long at least as those particular purposes required it.

Shapland v. Smith,
1 Bro. C.C. 75.
Fearn's Op.
421.

27. Lands were devised to trustees, upon trust that they should, every year, after deducting rates, taxes, repairs, and expenses, pay such clear sum as should remain to A. B. Lord Thurlow held that the trustees, being to pay the taxes and repairs, must have an interest in the premises; therefore that the legal estate was vested in them.

Vide 2 Cox's
Rep. 145.

Silvester v. Wilson,
2 Term R. 444.

28. A person devised lands to trustees and their heirs, upon trust to take and receive the rents and profits thereof, and to apply the same for the subsistence and maintenance of his son, during his life. It was determined that the son had only a trust.

29. In the case of a devise to trustees for particular purposes, the courts will consider the legal estate as vested in the trustees, as long as the execution of the trust requires it, and no longer; and will therefore, as soon as the trusts are satisfied, consider the legal estate as vested in the persons who are beneficially entitled to it.

Ante, s. 19.

30. Thus, in the case of Say and Sele v. Jones, the legal estate was held to be vested in the trustees during the life of the married woman. But upon her decease, it was considered as vested in the heirs of her body.

Doe v. Simpson,
5 East. 162.

31. So, where a person devised to trustees all his real estates, arrears of rent, and a bond and judgment; in trust, out of the rents and profits and arrears due, to pay an annuity of 50*l.* to his sister H. for her life, and another annuity of 50*l.* to his sister D. for life; after payment thereof, then in trust, out of the residue of the rents, to pay to his brother and nephew 800*l.* in trust for the benefit of the children of another brother. After payment of the annuities, and the sum of 800*l.* he devised his estates to his brother W. for life, &c. The testator fur-

Doe v. Timins,
1 Barn. & Ald.
530.

Doe v. Bartrop,
5 Taunt. 383.
Doe v. Nicholl,
1 B. & C. 336.

ther gave the trustees a power to grant building and other leases.

It was resolved, that the trustees took the legal estate for the lives of the annuitants ; with such a term for years in remainder as was necessary to raise the 800*l.* ; and that, subject thereto, the limitation for life to W. took effect as a legal limitation.

32. But where lands are devised to trustees, charged with the payment of debts, upon trust for a third person, the trustees will not take the legal estate.

33. A person devised his real estates, and also his personal estate, to trustees and their heirs ; to the intent that they should, in the first place, apply his personal estate in payment of his debts ; and as to his real estates, subject to his debts, he devised the same to R. P. for and during his life, &c.

Kenrick v.
Beaucherc,
3 Bos. & Pull.
175.

The Court of Common Pleas held that this was a mere devise charged with the payment of debts ; for it did not appear that the testator intended the trustees should be active in paying the debts. It would be more convenient that the legal estate should be vested in the trustees : but this was only an argument *ab inconvenienti*, from which they could not construe the testator to have said, what in fact he had not said.

34. Where an estate is conveyed or devised to trustees and their heirs, upon trust to pay debts generally, or debts particularly specified, and after payment of such debts, in trust for A. B. or in trust to convey such parts of the premises to A. B. as shall remain unsold ; A. B. has an immediate trust estate in the surplus, upon the execution of the deed, or the death of the testator. For in cases of this kind the payment of the debts is not a condition precedent, which must be performed before the subsequent limitation or devise can take effect ; but an interest commencing at the same time, and concurrent with the estate given to the trustees. Because the words, "after payment of debts," or, "when the debts are paid," only denote the order or course in which the several interests shall take place, in point of actual possession and perception of profits ; without preventing the subsequent estates, whether legal or equitable, from being vested in interest, at the same time with those which are prior to them in point of limitation.

A trust estate,
limited after
payment of
debts, vests
immediately.

Collect. Jur.
Vol. I. 214.
Tit. 36. c. 8.

35. The third mode of creating a trust estate arises from the answer of all the judges in 22 Eliz. upon a question put to them

Terms for years
limited in trust.
Dyer 369 a.

Bac. Read. 42.
Tit. 8. c. 1.

by the lord chancellor, that where a term for years was granted to A. to the use of or in trust for B., the legal estate in the term remained in A., and was not executed in B. by the statute of uses. For the words of the statute were:—"Where any person is *seised* to the use of another." Whereas in this case A. is not seised, not having a freehold; but is only possessed of the term, the word *seised* being only applicable to a freehold estate; so that in cases of this kind the person to whose use the term was declared was driven into the Court of Chancery; where the trustee was compelled to account with him for the rents and profits of the term; and to assign it to him when required. (a)

How trusts may
be declared.

36. By the statute 29 Cha. 2. c. 3. s. 7. it is enacted, "That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, (b) signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void, and of none effect."

Forster v.
Pitfal,
3 Ves. 696.

37. A declaration of trust requires no particular form, (c) provided it must be proved or manifested in writing; therefore a letter from a trustee, disclosing the trust, will be sufficient. And in a modern case Lord Alvanley, M. R. said it was not required by the statute that a trust should be created by writing; for the words of the statute were very particular in the clause respecting declarations of trust. It did not by any means require that all trusts should be created only by writing; but that they should be manifested and proved by writing. Plainly meaning that there should be evidence in writing, proving that there was such a trust. Therefore unquestionably it was not necessarily to be created by writing, but it must be evidenced by writing; then the statute was complied with, and the great danger of parol declarations, against which the statute was intended to guard, was entirely taken away; it must, however, be proved *in toto*, not only that there was a trust, but what it was.

12 Ves. 74.

(a) There may be a trust of a rent, as well as of land; of which an account will be given in Title XXVIII. *Rents*.

(b) [See *Leman v. Whitley*, 4 Russ. 423.]

(c) [In *Weaver v. Maule*, 2 Russ. & M. 97. it was decided, that where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir.]

38. Where a trust is confessed in an answer in Chancery, it will be sufficient.

39. A. in consideration of 80*l.* conveyed land to B. absolutely. A. brought a bill to redeem. B. by his answer insisted; that the conveyance was absolute: but confessed, that after the 80*l.* was paid with interest, it was to be in trust for the plaintiff's wife and children. This was held to be a sufficient declaration of trust.

Hampton v. Spencer,
2 Vern. 288.

Cottingham v. Fletcher,
2 Atk. 155.

40. Besides the above-mentioned direct modes of creating trust estates, there are several other cases where trusts arise from the evident intention of the parties, and the nature of the transaction; which are enforced in equity, and usually called resulting trusts, or trusts by implication. These are expressly saved by a clause in the statute of frauds, 29 Cha. 2. c. 3. s. 8. by which it is provided,—“That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise, or result by implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made.” And it has been held by Lord Cowper that this clause must relate to trusts, and equitable interests; not to a use, which is now a legal estate.

Resulting or implied trusts.

1 P. Wms. 112.

41. Where a contract is entered into for the purchase of a real estate, a trust immediately results to the purchaser; the vendor becomes a trustee for him till a conveyance of the legal estate is made; and the interest of the vendor becomes personalty, consisting merely of a right to the purchase money.

Contract for a purchase.
1 Cha. Ca. 39.
9 Mod. 78.
Ripley v. Waterworth,
7 Ves. 425.

42. Where an estate is purchased in the name of one person, and the consideration is given or paid by another, there is a resulting trust in favour of the person who gave or paid the consideration.

Purchase in the name of a stranger.

43. Thus it was resolved by the Court of Chancery in 35 Cha. 2. that where a man bought land in another's name, and paid the money, it would be a trust for him who paid the money, though no deed declaring the trust; for the statute 29 Cha. 2. did not extend to trusts raised by operation of law.

Anon.
2 Vent. 361.
1 Vern. 109.
2 Atk. 71. 150.

44. Lord Hardwicke has said, that where a purchase is made, the purchase money being paid by one, and the conveyance taken in the name of another, there was a resulting trust for the

9 Mod. 235.

person who paid the consideration. This was where the whole consideration moved from such person. But he never knew it, where the consideration moved from several persons; for that would introduce all the mischiefs which the statute of frauds was intended to prevent. Suppose several persons agreed to purchase an estate in the name of one, and the purchase money by the deed appeared to be paid by him only; he did not know any case where such persons should come into the Court of Chancery, and say, they paid the purchase money; but it was expected there should be a declaration of trust.

Finch v. Finch,
15 Ves. 43.

45. In all cases of this kind the payment of the money must be proved by clear and undoubted evidence; for otherwise a court of equity will not interfere. But evidence of any kind, even parol evidence, is admissible to rebut a resulting trust, and to shew a purchaser's intention, that the estate should belong to the person in whose name the conveyance was taken; upon the same principle that parol evidence is admissible to rebut a resulting use.

Tit. 11. c. 4.

Bellasis v.
Compton,
2 Vern. 294.

46. Thus, in a case in 1693, the counsel contended that where there was an express trust declared, though but by parol, there could be no resulting trust; for resulting trusts were saved indeed by the statute of frauds, but only as they were before that act. Now a bare declaration by parol, before the act, would prevent any resulting trust. The Court seemed to be of that opinion.

Lamplugh v.
Lamplugh,
1 P. Wms. 111.

47. A father purchased lands in the names of his younger son and nephew: but in the conveyance the whole purchase money was mentioned to be paid by the father; who took the profits during his life, and died, leaving the younger son an infant. The eldest son brought his bill against the younger son, and the nephew; insisting that the money being mentioned in the deed to have been paid by the father, this made the defendants trustees for the father; consequently for the plaintiff.

Bartlett v.
Pickeragill,
1 Eden. 515.

It was resolved that parol evidence should be admitted to shew the intention of the father, that this conveyance was for the benefit and advancement of the younger son; because it concurred with the conveyance, and was only to rebut a pretended resulting trust.

Purchase with
trust money.

48. It was formerly doubted whether in the case of a purchase made by a trustee, with trust money, a resulting trust

would arise to the person entitled to the money ; because that would be to contradict the deed by parol evidence, in direct opposition to the statute of frauds. It has however been since determined that evidence *aliunde* is admissible to shew that the purchase was made with trust-money. And where that circumstance has been clearly proved, a trust will result to the person entitled to the money.

49. A bill was brought by the legatees of John Ryal, against the executrix and heir at law of Jonathan Ryal, for satisfaction out of his assets, and as against the heir at law, to have satisfaction out of an estate purchased by Jonathan Ryal as the plaintiff insisted, with the assets of John Ryal, the original testator. The defendant, the executrix, admitted, that as to one particular estate, it appeared by her testator's papers, that it was purchased with 250*l.* of the testator's money. Proof was read that Jonathan Ryal, after the testator's death, purchased several estates, and before that time was a poor person, not able to pay for them out of his own money. The counsel for the plaintiff insisted that the heir at law was to be considered as a trustee for them, as far as the estate appeared to be purchased with the assets of John Ryal. On the other side it was contended that money could not be followed into land.

Ryal v. Ryal,
Amb. 413.

Lord Hardwicke said, the Court had been very cautious in following money into land : but had done it in some cases. No one would say but the Court would, if it was actually proved that the money was laid out in land. The doubt with the Court in these cases had been on the proof. There was difficulty in admitting proof ; parol proof might let in perjury : but it had always been done, when the fact had been admitted in the answer of the person laying it out. If the executor of John Ryal had been a party, and admitted it, there would have been no doubt : but the admission was by his representative, which, though it did not bind the heir, was ground for inquiry. The way of charging the heir was by considering him as a trustee ; as when lands were purchased by one, in the name of another, it was a resulting trust by law, and out of the statute ; and upon inquiry a little would do to make it a charge *pro tanto*.

It was referred to the Master to inquire whether the estate was purchased with 250*l.* of the testator's money, or not.

50. Although a trustee for a purchase should buy land ; yet

it will not be liable to the trust, unless there are circumstances affording a strong presumption that the land was bought with the trust-money.

Perry v.
Phelps,
4 Ves. 108.

51. T. Lockyer having a considerable property devised to him, in trust to lay it out in the purchase of lands, bought several real estates, but died without personal assets. A bill was filed by those who would have been entitled to the estates directed to be purchased, praying that the deficiency of the personal estate of Lockyer should be made good out of the real estates which he had purchased. There was no evidence that the lands were purchased with the trust money. It was contended on behalf of the plaintiffs, that where a man is bound to do an act and does what may enable him to do it, he shall be taken to have done that, in pursuance of what he was bound to do; and that between representatives.

Lord Rosslyn declared that the plaintiffs had no lien on the estates purchased by Lockyer; being creditors by simple contract only. If there had been any ground to presume that the purchase had been made with the trust money, it would have been otherwise.

17 Ves. 173.

On a bill of review, the decree was affirmed by Lord Eldon.

Conveyance
without consi-
deration.

Tit. 11. c. 4.

52. Where the legal estate in lands is conveyed to a stranger, without any consideration, there arises a resulting trust to the original owner; in conformity to the old doctrine, that where a feoffment was made without consideration, the use resulted to the feoffor.

Norfolk v.
Browne,
1 Ab. Eq. 381.
Prec. in Cha.
80.

53. The Duke of Norfolk executed a grant of the next avoidance of a church to a clergyman, who was much employed by him: but the grantee knew nothing of it; and being examined in a cause, deposed that he did not purchase it of the duke. It was decreed to be a resulting trust for the grantor, there being no trust declared.

1 Atk. 191.

54. In the case of voluntary settlements and wills, if there is no declaration of the trust of a term, it results to the settlor: otherwise where it is a settlement for a valuable consideration, and in the nature of a contract for the benefit of a wife or children.

A trust declared
in part.
Lloyd v. Spillet,
2 Atk. 150.

55. Where the legal estate in lands is conveyed to a trustee, and a trust is declared as to part only, nothing being said of

the rest; what remains undisposed of results to the original owner.

56. Lord Foley devised his estates to trustees for a term of ninety-nine years, remainder to his eldest son for life, remainder to his first and other sons in tail, remainder to his second son in the same manner. The trust of the term for years was to pay off certain scheduled debts, and to make an annual allowance to his two sons for their support. The scheduled debts being stated to be paid, a bill was filed by other creditors of the sons of the testator, against the trustees, praying that the term might be declared to be attendant on the inheritance, and the trustees restrained from setting up the term to defeat any ejectment or other remedy which the plaintiffs might be advised to pursue for the recovery of their debts.

Davidson v. Foley,
2 Bro. R. 203.
Sidney v. Shelley,
19 Ves. 352.

Lord Thurlow said, the rule of law was, that where the trusts of a term were exhausted, a trust resulted, for want of a farther disposition, to the legal tenants. In his judgment these must be resulting trusts, and therefore must go to the tenant for life.

Habergham v. Vincent,
2 Ves. Jun. 204.

57. In the same manner where the whole of an estate is conveyed for particular purposes, or on particular trusts only, which by accident or otherwise cannot take effect, a trust will result to the original owner, or his heir; as where a testator devises real estates to trustees, in trust to sell, and to apply the money in a particular manner; and such purpose cannot be effected, the fund, though money will be considered as land, and result to the heir.

Or which cannot take effect.
Prec. in Cha.
162. 541.
3 P. Wms. 20.
Gravenor v. Hallum,
Amb. 643.

58. A woman devised her real and personal estate to trustees, in trust to sell and pay debts and legacies; and to pay the residue to five persons, to be equally divided between them. One of the residuary legatees died in the life-time of the testatrix, by which her legacy became lapsed.

Digby v. Legard, 3 P. Wms.
22. n.

It was decreed by Lord Bathurst, that this was a resulting trust, as to the share of the person who died in the life-time of the testatrix, for the benefit of the heir.

Ackroyd v. Smithson,
1 Bro. R. 500.
2d edit.

59. The rule that where lands are devised for a particular purpose, what remains after that purpose is satisfied results to the heir, admits of several exceptions.

Exception.

60. R. Smith devised an advowson to Grace Smith, willing and desiring her to sell and dispose of the same to Eton College; and, on their refusal, to Trinity College, Oxford, &c. Soon after

Hill v. Epis.
London,
1 Atk. 618.

the death of the testator, Grace Smith presented a person to the living; upon which the heirs at law of the testator filed their bill, praying that the bishop might be enjoined from accepting the presentee of Grace Smith; insisting that the testator did not intend the then avoidance should go to Grace Smith; but that she ought to be considered altogether as a trustee for the heirs at law of the testator.

Lord Hardwicke said, the general question was, whether there was a resulting trust or not: on the first hearing he inclined to think there was, but he had changed his opinion entirely. The general rule, that where lands were devised for a particular purpose, what remained resulted, admitted of several exceptions. If J. S. devised lands to A. to sell them to B. for the particular advantage of B., that advantage is the only purpose to be served, according to the intent of the testator; and to be satisfied by the mere act of selling, let the money go where it will. Yet there was no precedent of a resulting trust in such a case. Nor was there any warrant from the words or intent of the testator to say, the devise severed the beneficial interest, but was only an injunction on the devisee to enjoy the thing devised in a particular manner. If A. devised lands to J. S., to sell for the best price to B., or to lease for three years at such a fine; there was no resulting trust. So that the devise here amounted to no more than this:—the testator gave the advowson to G. Smith, but if such or such a college would buy it, then he laid an injunction upon her to sell; therefore, there were two objects of the testator's benevolence; Grace Smith, and the Colleges.

King v. Dennison, 1 Ves. & Beam. 260.

Where no appointment is made.

Fitzg. 223.

Clere's case, Tit. 11. c. 4.

Renewal of a lease by a trustee.

1 Cha. C. 191.
1 Vern. 276.
284.

Keech v Sandford, Sel. Ca. in Ch. 61.

61. Where a person makes a conveyance of the legal estate to trustees, upon such trusts, and for such intents and purposes as he shall appoint, and never makes an appointment, there will be a resulting trust to him and his heirs. For the trust in equity must follow the rules of law in the case of a use.

62. It has been long settled, that where a trustee takes a renewal of a lease in his own name, the renewed lease shall, in equity, be subject to the former trust. This doctrine is founded on general policy to prevent fraud; for, as the trustee's situation, in respect to the estate, gives him access to the landlord, it would be dangerous to permit him to make use of that circumstance for his own benefit.

63. A lease of the profits of Romford market was devised to a

trustee, in trust for an infant; before the expiration of the term, the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused; in regard that it being only the profits of a market, there could be no distress; and the only security for payment of the rent would be a covenant, which the infant could not enter into. The trustee then took a lease for his own benefit.

It was decreed by Lord King that the lease should be assigned to the infant: that the trustee should account for the profits, since the renewal, and be indemnified from the covenants in the lease. He said he must consider this as a trust for the infant; for if a trustee, on a refusal to renew, might have a lease to himself, few trust estates would be renewed by the *cestui que trust*. That the trustee should rather have let it run it out, than have taken a lease himself. It might seem hard that the trustee was the only person of all mankind who could not have the lease: but it was very proper that rule should be strictly pursued, and not in the least relaxed. For it was very obvious what would be the consequence of letting trustees take leases, on a refusal to renew to the *cestui que trust*.

Blewett v. Millett.
7 Bro. Parl. Ca. 367.
Killick v. Flexney,
4 Bro.C.C.161.
James v. Dean,
11 Ves. 383.
Fitzgibbon v. Scanlan,
1 Dow. 261.

64. This doctrine has been extended to the case of persons having only a particular and limited interest in a leasehold estate.

Or by persons having only a particular estate.

65. Thus where a tenant for life of a crown lease, under a marriage settlement, got a reversionary renewal of the lease; it was decreed by Sir T. Sewell, M. R., that it should go to the uses of the settlement; and the decree was affirmed by Lord Camden.

Taster v. Marriot, Amb. 668.
734.
Lee v. Vernon,
5 Bro. Parl. Ca. 10.

66. Where any fraud is committed in obtaining a conveyance of real property, the grantee in such conveyance will be considered, in equity, as a trustee for the person who has been defrauded.

Where there is fraud.
2 Atk. 160.

67. It has been stated that the statute of uses does not extend to copyhold estates; therefore, if a copyhold is surrendered to A. to the use of B., the legal estate will not be transferred to B. But he will be entitled in equity to the rents and profits; and to call on A. for a surrender of the estate.

Trusts of Copyholds.

68. It appears to have been held in a modern case, that copyholds are not within the seventh section of the statute of frauds,

Doe v. Danvers,
7 East. 299.
Ante, s. 36.

for this applies only to cases where the legal and equitable estates are separated. But there may be a resulting or implied trust of a copyhold, as well as of a freehold estate.

Howe v. Howe,
1 Vern. 415.
Right v. Baw-
den, 3 East. 260.

69. Thus were copyhold estates are granted for lives, the person who pays the consideration will be deemed the real owner; and the other persons, whose names are inserted in the grant, trustees for him.

Benger v. Drew,
1 P. Wms. 780.

70. Copyhold lands were granted to husband and wife, and J. S., for their several lives, *successivè*; but by the copy it appeared that the fine was the money of the husband and wife.

Lord Macclesfield said, the third person (J. S.) was but a trustee for the husband and wife, by whom the purchase money was paid.

Withers v.
Withers,
Amb. 161.

71. By the custom of the manor of A., copyholds were grantable for three lives, *successivè sicut nominantur*. One Price being the last life in an old copy, the lord of the manor advised him to renew. Upon that he enquired after two healthy young persons, and named the defendants, Harris and Bowles; a copy was granted, to hold to them *successivè*. It also appeared on the copy, that the fine, which was 120*l.*, was paid by Price; and that the defendants were strangers to Price.

Smith v. Baker,
1 Atk. 385.

Lord Hardwicke was of opinion, that resulting trusts of copyholds, as well as of freeholds, were within the eighth section of the statute of frauds; therefore that the representatives of Price were entitled to the copyhold by operation of law.

2 Black. R. 694.

72. In a modern case, the Court of King's Bench observed that in the West it was usual, upon copyholds for lives, for the *census que trust* to take, in the order in which they stood in the copy: but the person who put in the lives, and paid the fine, had a power to dispose of the estate.

A purchase in
the name of a
child is an ad-
vancement.

73. Where a father purchases lands in the name of his infant child, without any declaration of trust, and takes the profits during the minority of the child, such purchase will be considered in equity as an advancement for the child, and not as a trust for the father. Because between a father and his child, blood is a sufficient consideration to raise a use. And herein the law of trusts does, as it ought to do, agree with the law of uses. For if before the statute 27 Hen. 8. a father had made a feoffment to his son, without any consideration, no use would have

Grey v. Grey,
1 Cha. C. 296.
Finch R. 341.

resulted to the father, because blood was a sufficient consideration to have vested the use in the son. Besides, as a father is bound by the law of nature to provide for his child, the purchasing in his name will be construed in a court of equity to be a performance of that obligation; and the taking of the rents during the minority of the child, only implies that the father acted as guardian to his child.

74. J. Mumma purchased a copyhold in the name of his eldest son, an infant of about eleven years old, laid out 400*l.* in improvements, paid the purchase money and the fines, and enjoyed it during his life. He surrendered to the use of his will, devised it to his wife for life, remainder to his younger children, and made other provisions for his eldest son. Upon the death of the father, the eldest son recovered this copyhold in ejectment. The widow brought a bill to be relieved upon the principle that the eldest son was a trustee for the father.

Mumma v. Mumma,
2 Vern. 19.

Lord Chancollor Jefferies declared, that as the eldest son was but an infant at the time of the purchase, though the father did enjoy during his life, it must be considered as an advancement for the son, and not a trust for the father.

75. In the case of *Lamplugh v. Lamplugh*, it was resolved, that if the purchase had been made in the younger son's name only, it had been plainly an advancement for him, and no trust. That the case did not differ, in regard the persons named by him did disclaim; especially since prudential reasons might be given why those persons were joined: namely, that they might help and protect the infant younger son; also to prevent the estates descending to a remote relation, in case the younger son died before his father. For in such case a court of equity would have said, if the father were to come for the estate, though this would have been an advancement, in case the younger son had lived to have enjoyed it, yet the younger son dying, the trustee should, in equity, have conveyed it back to the father. And this might be the use and intention of naming these trustees. Besides, the younger son being but eight years old, was unfit to be a trustee, therefore must be intended to have been named for his own benefit.

Ante, s. 47.

76. A father purchased copyhold lands in his son's name, who was then eighteen years of age, and continued in possession till his death.

Taylor v. Taylor,
1 Atk. 380.

Lord Hardwicke. — “ I am of opinion that it should be considered as an advancement for the son ; and found my opinion greatly on the case of *Mumma v. Mumma* : and though two receipts are produced under the son’s hand, for the use of the father, I think that will not alter the case ; for the son, being then under age, could give no other receipt in discharge of the tenants, who held by lease from the father. And in this case I am of opinion that parol evidence may be admitted, though, indeed, improper when offered against the legal operation of a will, or an implied trust : but here it is in support of law and equity too.”

Ante, s. 74.

Dyer v. Dyer,
2 Coke’s R. 92.

Scroop v.
Scroop,
1 Cha. Ca. 27.

77. A purchase by a father in his own name and that of his son has, in some cases, been deemed an advancement for the son, not a trust for the father. But this doctrine has been altered ; and it has been held, that in such a case a moiety of the estate will be subject to the father’s debts.

Stileman v.
Ashdown.
2 Atk. 477.

78. A father made a purchase of land in his own name, and that of his eldest son, and their heirs ; and a similar purchase in his own name and that of his younger son. The father paid the purchase-money, and continued in possession till the time of his death. A judgment creditor of the father’s brought his bill to have satisfaction of his debt out of those estates. It was insisted that the sons took them to their own use as an advancement, and were not trustees for their father.

Lord Hardwicke said, — The general rule had been admitted, and had been long the doctrine of the Court, that notwithstanding the father paid the whole money, yet if the purchase was made in the name of a younger son, the heir of the father should not insist it was a trust for the father. But this case differed from that rule, or any other that he remembered ; and if he could find any material difference, he should, in his own judgment, be inclined to relieve the creditor. For though it might be proper *stare decisis* ; yet he thought the case had gone far enough in favour of advancements, and he ought not carry it farther. It must be admitted that in some cases which had been before the Court, the father had continued in possession, where the purchase had been made singly in the name of the son, and yet held an advancement for the son ; and for this reason, because the father was the natural guardian of the sons during their minority. Here the purchase was in

the names of the father and sons as joint-tenants; now this did not answer the purpose of an advancement, for it entitled the father to the possession of the whole till a division, and to a moiety absolutely, even after a division; besides the father's taking a chance to himself of being a survivor of the other moiety. If the son had died during his minority the father would have been entitled to the whole by survivorship; and the son could not have prevented it by severance, he being an infant. Suppose a stronger case, that the father had taken an estate by purchase to himself for life, with remainder to his son in fee,—should this prevail against the creditors? No, certainly; for the defendant's father having the profits for life, and the son only a remainder, the estate would have been liable. A material consideration for the plaintiff was, that the father might have other reasons for purchasing in joint-tenancy, namely, to prevent dower on the estate, and other charges. Then consider how it stood in respect to the creditor. A father here was in possession of the whole estate, and must necessarily appear to be the visible owner of it, and the creditor would have had a right, by virtue of an *elegit*, to have laid hold of a moiety; so that it differed extremely from all the other cases. Now it was very proper that the Court of Chancery should let itself loose, as far as possible, in order to relieve a creditor, and ought to be governed by particular circumstances of cases: and what could be more favourable to the plaintiff than that every foot of the estate was covered by these purchases? and unless the Court let him in upon these estates, the plaintiff had no possibility of being paid. Decreed, that a moiety of these purchases was liable to the debt.

79. A purchase by a grandfather in the name of his grandchild, provided the father be dead, in which case the grandchildren are in the immediate care of the grandfather, will be deemed an advancement for the grandchild, not a trust for the grandfather.

Ebrand v. Dancer,
2 Cha. Ca. 26.
Lloyd v. Read,
1 P. Wms. 608.

80. Where a person purchased a copyhold estate in the names and for the lives, of his three natural children, who were admitted, and described as his daughters in the admission, Mr. Fearne inclined to the opinion that the daughters were entitled to the estate for their own use: because every man is under a natural obligation to provide for such children.

Fearn's Op.
327.

Exception.
Children
emancipated.
Finch R. 341.
Elliot v. Elliot,
2 Cha. Ca. 231.
Pole v. Pole,
1 Ves. 76.

81. It is said by Lord Nottingham, that where a son is married in the life of his father, and by him fully advanced and emancipated, there a purchase by the father in the name of his son may be a trust for the father as much as if it had been in the name of a stranger; because in that case all presumptions or obligations of advancement cease. But where the son is not advanced, or but advanced or emancipated in part, there is no room for any construction of a trust by implication; and without clear proofs to the contrary, it ought to be taken as advancement of the son.

Ex Prætoris,
271.

82. It is also said by Lord Chief Baron Gilbert, that if a father purchases in the name of his son, who is of full age, which by the English law is an emancipation out of the power of the father; there, if the father takes the profits, or lets leases, or acts in any other manner as the owner of the estate, the son will be considered as a trustee for the father; because there is the same resulting trust, as if the son were a stranger, since it was purchased with the father's money. But if the father had let the son continue in possession from the time of the purchase, without acting as owner, it would be an advancement. For the legal interest being in the son, and the father permitting him to act as owner of the estate, from the time of the purchase, did as much declare the trust for the advancement of the son, as if it had been declared in express words in the deed.

And also a wife.

83. A wife cannot be a trustee for her husband; therefore if a husband purchases lands in the name of his wife, it shall be presumed, in the first instance, to be an advancement and provision for the wife.

Kingdom v.
Bridges,
2 Vern. 67.

84. A married man purchased a walk in a chase, and took the patent to himself and his wife, and J. S. for their lives, and the life of the longest liver of them. Lord Chancellor Jefferies held, that this should be presumed an advancement and provision for the wife; for she could not be a trustee for her husband. Decreed to the wife for life; and if J. S. should survive her, then to be a trust for the executors of the husband.

Back v. Andrews, Prec. in
Cha. 1.
2 Vern. 120.

85. A husband purchased a copyhold, to himself, his wife, and daughter, and their heirs. It was held to be an advancement, and not a trust; and that a mortgage by the husband should not bind the lands after his decease, in the life time of the wife and daughter.

86. There can be no resulting or implied trust between a lessor and his lessee, because every lessee is a purchaser by his contract and his covenants; which excludes all possibility of implying a trust for the lessor. Therefore if in that case there be any trust at all, it must be declared in writing; but there may be a resulting or implied trust between the assignor and assignee of a leasehold estate.

No trust between lessor and lessee. *Pilkington v. Bayley*, 7 Bro. Parl. Ca. 383. *Hutchins v. Lee*, 1 Atk. 447.

87. [Notwithstanding the *dictum* of Lord Hardwick in the case of *Bagshaw v. Spencer*, that all trusts were in notion of law executory (and which has been controverted by Fearn with his usual ability), the distinction is now well established between trusts executed and trusts executory, in marriage articles and wills.

Trusts executed distinguished from trusts executory. 2 Atk. 246. 583. 1 Coll. Jurid. 413. Rem. 141. Ed. 8.

88. Where the devise or trust is directly and wholly declared by the testator or settlor, so as to attach on the lands immediately, under the deed or will itself, it is a trust executed and complete; and must be construed strictly according to its legal import, and in analogy to corresponding limitations of legal estates: but where the devise, trust, or agreement is directory or incomplete, describing the intended limitation of some future conveyance or settlement directed to be made for effectuating it, there the trust is executory; and the Court of Chancery will not construe the devise or articles strictly, but will endeavour to discover the intention, and execute the trust, according to that intention.]

Tit. 32. c. 20. Tit. 38. c. 14.

89. When trusts were first introduced, it was held that none but those who were capable of being seised to a use could be trustees. This has been altered; and it is now settled, that the king may be a trustee: but the remedy against him is in the Court of Exchequer.

1 Jac. & Walk. 570.

90. A corporation may also be a trustee, not only from its own members, but also for third persons. And where a corporation is a trustee, the Court of Chancery has the same jurisdiction over it as over a private person.

Who may be trustees. 1 Ves. 453. 3 Comm. 438.

91. When once a trust is sufficiently created, it will fasten itself on the estate. Therefore if a conveyance or devise, by which a trust is created, becomes void by the incapacity or death of the grantee or devisee; still the Court of Chancery will decree the trust to be carried into execution. The relief is administered by considering the land, in whatever person

Mayor of Coventry v. Att.-General, 7 Bro. Parl. Ca. 285. 2 Ves. jun. 46.

1 Ves. 468.

vested, as bound by the trust; and compelling the heir, or other person having legal estate, to perform it.

Bennet v.
Davis, 2 P.
Wms. 316.

92. A person devised lands to his daughter, a married woman, for her separate use. It was held that the husband should be a trustee for his wife. For as the testator had a power to devise the premises to trustees for the separate use of his wife, the Court of Chancery, in compliance with his declared intention, would supply the want of them.

Sonley v. Clock
Makers' Com-
pany, 1 Bro.
C. C. 81.
Tit. 38. c. 2.

93. An estate was devised to the Clock Makers' Company, upon certain trusts. Decreed, that though the devise was void, the Clock Makers' Company not being capable of taking, yet that the trust was sufficiently created to fasten itself upon any estate the law might raise; therefore that the heir at law was a trustee for the uses of the will.

Snags' case,
cited in Freem.
Ch. Rep. 2 ed.
43. c. 47.
qu. Sherly v.
Fagg, 1 Ch. Ca.
68. & see 1 P.
Will. 278, 279.

94. [The rule that the trust attaches upon the land so as to convert all persons acquiring the legal estate into trustees, has an exception in the case of a conveyance by the trustee, to a purchaser for a valuable consideration, without notice of the trust: the remedy of the *cestui que trust*, is against the trustee.]

CHAP. II.

Rules by which Trust Estates of Freehold are governed.

SECT. 1. *A Trust is equivalent to the Legal Ownership.*
 6. *Trusts are Alienable,*
 9. *Devisable and Descendible.*
 10. *May be Intailed.*
 11. *And also limited for Life.*
 12. *Subject to Curtesy.*
 16. *When subject to Dower.*
 22. *Not to Free Bench.*
 25. *Forfeitable for Treason.*

SECT. 27. *But not for Felony.*
 29. *Not subject to Escheat.*
 30. *Liable to Crown Debts.*
 31. *And to all other Debts.*
 34. *Merge in the Legal Estate.*
 36. *Where a Legal Estate is a Bar in Ejectment.*
 39. *Where a Re-conveyance will be presumed.*

SECTION I.

WE have seen that trust estates owe their origin to the strict construction given by the courts of law to the Statute of Uses; in consequence of which the Court of Chancery interposed its authority, and supported this kind of property. In the exercise of this jurisdiction that Court first laid it down that a trust being in fact a use not executed, should be regulated by the rules which had been established respecting uses, before they were changed into legal estates: but as this doctrine was productive of all the inconveniencies which were meant to be remedied by the Statute of Uses, it has been in a great degree abandoned.

A trust is equivalent to the legal ownership.

2. In the case of *Burgess v. Wheate*, Lord Mansfield said,—
 “In my apprehension, trusts were not on a true foundation till Lord Nottingham held the great seal. By steadily pursuing, from plain principles, trusts in all their consequences, and by some assistance from the Legislature, a noble, rational, and uniform system of law has been since raised. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Henry VIII. meant to avoid. The *forum* where it is adjudged is the only difference between trusts and legal estates.

Infra, Tit. 30.
 1 Black. R.
 160.
 1 Eden. 223.

Trusts here are considered, as between the *cestui que trust* and trustee, and all claiming by, through, or under them, or in consequence of their estates, as the ownership, and as legal estates; except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate."

Watts v. Ball,
infra, s. 13.
2 Bro.C.C.271.

3. In a subsequent part of the same speech, Lord Mansfield says, the above doctrine is founded on the maxim that equity follows the law; which is a safe, as well as a fixed principle; for it makes the substantial rules of property certain and uniform, be the mode of following it what it will. And Lord Thurlow has observed that, in many acts of parliament, an equitable estate was considered the same as if it were a legal estate. That the words seised in law or in equity, in the qualification act, shewed that the word seised was applicable to both; and that the word seisin extended to being seised in equity.

Cholmondeley
v. Clinton, Tit.
31. c. 2.

4. It is of the utmost importance that trust estates of the nature of freehold should be considered in equity as perfectly analogous to legal estates of the same kind; and subject to every incident to which such legal estates are liable. Consequently, that there should be a disseisin, abatement, or intrusion, allowed on a trust estate, as well as on a legal one. And this doctrine was admitted by Lord Eldon and Lord Redesdale in a late case which will be stated hereafter.

Tit. 11. c. 2.

1 Black.R.155.

5. A trust estate still, however, retains some few qualities of a use. Thus confidence in the person is necessary to the existence of a trust; so that even at this day, if a trustee sells the land for a valuable consideration to a person who has no notice of the trust, the purchaser will not be compelled in Chancery to execute it. As for privity of estate, it was formerly held to be as necessary as confidence in the person. But this seems to be now altered; for Lord Mansfield has said, "That part of the old law which did not allow any relief to be given for or against any estates in the *post*, does not now bind by its authority in the case of trusts."

Trusts are
alienable.

6. Any disposition of a trust by the *cestui que trust* was formerly binding on the trustees in a court of equity. But it was enacted by the statute of Frauds, s. 9.—"That all grants and assignments of any trust or confidence shall be in writing, sign-

ed by the party granting or assigning the same ; or else shall be utterly void and of none effect."

7. Although by the stat. 1 Rich. 3. c. 1. the conveyance of a person, having only a use, was made good against the feoffees to use ; yet it does not appear to have been ever held, since the statute of Uses, that a *cestui que trust* could convey any thing more than a trust estate. And in all modern cases, where there has been a conveyance from a *cestui que trust*, the legal estate has been considered as still remaining in the trustee.

Tit. 11. c. 2.
1 Sanders on
Uses 35.

8 Term R. 494.

8. It was laid down by Lord Nottingham as a general rule,—
"That any legal conveyance or assurance by a *cestui que trust* shall have the same effect and operation upon a trust, as it should have had upon the estate in law, in case the trustees had executed their trust.

2 Cha. Ca. 78.

9. Trust estates are also devisable, as will be shewn hereafter. And where they are not devised, they will descend to the heir of the person who was last entitled to them, in the same manner as legal estates.

Devisable and
descendible.
Tit. 38. c. 3.
Tit. 29. c. 3.

10. It was formerly held that a trust estate, being merely the creature of a court of equity, was not within the statute *De Donis* ; and, therefore, that where a trust estate was limited to a person and the heirs of his body, he might, after issue had, bar such issue by a feoffment, bargain and sale, &c. But this has been long since altered ; and it was fully settled that a trust estate might be entailed in the same manner as a legal one ; and that [previously to the stat. 3 & 4 Will. 4. c. 74.] such entail could only be barred by a fine or common recovery.

May be entailed.
North v. Way,
1 Vern. 13.
Bowater v. Ellis,
2 Vern. 344.

Kirkham v.
Smith, Amb.
618.

11. A trust estate may also be limited to a person for life. And in such case no fine or other assurance, by the *cestui que trust* for life, will operate as a forfeiture of his estate ; because the forfeiture of legal estates being derived from feudal principles, and never extended to uses, the Court of Chancery has in this instance adhered to the ancient rules.

And also limited
for life.

12. Although a man could not be tenant by the curtesy of a use before the stat. 27 Hen. 8. because the wife could have no seisin of a use ; yet it has been determined by the Court of Chancery that a husband may acquire an estate by the curtesy in a trust.

Subject to cur-
tesy.

13. A person having two daughters, devised his lands to trus-

Watts v. Ball,
1 P. Wms. 108.

tees and their heirs, in trust to pay his debts, and to convey the surplus to his daughters equally. The eldest daughter brought her bill for a partition; and the only question was, whether the husband of the youngest daughter should have an estate for life conveyed to him as tenant by the curtesy. The husband, in his answer, had sworn that he married the younger daughter upon a presumption that she was seised in fee of a legal estate in the moiety; that at the time of the marriage she was in the receipt of the profits of such moiety; and it was admitted that this trust was not discovered till after the death of the younger daughter. Lord Cowper decreed that trust estates ought to be governed by the same rules, and were within the same reason, as legal estates. That as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of a trust estate. And if there were not the same rules of property in all courts, all things would be as it were at sea, and under the greatest uncertainty.

14. [The husband will be entitled to curtesy out of the trust or equitable estate of inheritance of the wife, notwithstanding the trust be declared during the life of the wife for her separate use.

15. This point was for a time unsettled.

1 Atk. 606.

In *Roberts v. Dixwell*, the trust was to convey the testator's real estate for the sole and separate use of his daughter Priscilla, and after her death upon trust for the heirs of her body for ever. Lord Hardwick held this not to be an estate tail in Priscilla, because the trust was executory; but that it would have been otherwise had the trust been executed; the trust for the separate use of Priscilla for life, not preventing the union of the life estate with the subsequent trust to the heirs of her body.

Fearne Rem.
54—5.

3 Atk. 695. 715.
S. C. 1 Ves.
sen. 698.

In the subsequent case of *Hearle v. Greenbank*, Lord Hardwick made a decision in opposition to the general doctrine laid down by him in the preceding case. There Doctor Worth devised real estate to trustees upon trust for the separate use of Mary, the wife of William Winsmore, and upon further trust to permit her to dispose thereof by deed or will, notwithstanding coverture. Mary Winsmore was the only child and heir of the testator. Her appointment by will was invalid by reason of her infancy: and at the testator's death the equitable fee in reversion, not being disposed of by the will, descended upon her.

The question was, whether her husband was entitled to curtesy ; and Lord Hardwick decided in the negative, observing, there was no seisin in deed of the inheritance in the wife during the coverture, and so the husband was neither at law, nor in equity tenant by the curtesy.

In the recent case of *Morgan v. Morgan*, closely resembling *Hearle v. Greenbank*, Sir John Leach, V. C. decided that the husband was entitled to the curtesy, thereby overruling the latter case. In *Morgan v. Morgan*, the trust in a marriage settlement was, for the sole and separate use of the wife for life, with power to appoint by deed or will ; and for want of appointment, for the wife, her heirs, and assigns. His honour observed, in the conclusion of his judgment, that the husband was partially and not wholly excluded from the enjoyment of the wife's property, that the Court, according to the intention of the settlement, would restrain his interference with the rents during the wife's life, but as there was no further exclusion expressed in the settlement, the Court would not restrain him from the enjoyment of his general right as tenant by the curtesy.]

5 Mad. 408.

Bennet v. Davis,
2 F. Will. 316.

16. It might have been expected that where the Court deviated so far from the old law of uses as to allow curtesy of an equitable estate, it would have extended the same indulgence to dower, being a right strongly favoured by the common law ; yet it had been long settled [previously to the recent statute 3 & 4 Will. 4. c. 105.] that a widow is not dowable of an equitable estate, whether the husband himself had parted with the legal estate, or a trust estate had descended upon or been limited to him.

When subject to
dower.

17. The first time this point appears to have been determined was in 12 Cha. 2. ; and although this doctrine has been followed by subsequent chancellors, yet they have uniformly expressed their regret at being bound by such a precedent. But many cases of this kind have arisen, and the determinations have been uniform against the claim of dower out of a trust estate.

Colt v. Colt,
1 Cha. R. 134.

18. Thus a husband before marriage conveyed his estate to trustees and their heirs, in such manner as to put the legal estate out of him. It was determined, that though the trust estate was limited to him and his heirs, yet his widow should not be endowed of it : that the court had never gone so far as to allow dower in such a case.

Bottomley v. Fairfax,
Prec. in Cha. 336.

Ambrose v.
Ambrose, 1 P.
Wms. 321.

Printed cases,
1717.
2 P. Wms. 708.

Goodwin v.
Winsmore,
s. 23.

Banks v. Sutton,
2 P. Wms. 706.

Dixon v. Sa-
ville, Tit. 15. c. 3.

Not to free
bench.
2 Vern. 585.

19. A. purchased an estate in the names of two trustees, who acknowledged the trust after his death. Upon a claim made by his widow to dower, it was decreed that she was not dowable. The decree was affirmed in the House of Lords.

20. Sir J. Jekyll has attempted to distinguish between the case of a trust created by the husband himself, and a trust created by another person. In the first case he admits it to be a settled point, from the authority of the preceding cases, that the wife cannot have dower; because it must be presumed the trust was created for the sole purpose of barring dower. Accordingly it had been the common practice for purchasers to take a conveyance of the legal estate in a trustee's name, to prevent dower. But in the second case, where a trust estate descended, or came to the husband from another person, it was different. This distinction has however been exploded by Lord Hardwicke, in a case which will be stated hereafter.

21. It is also laid down by Sir Joseph Jekyll, that where a particular time is appointed for conveying the legal estate to the husband, and he outlives that time, without obtaining such conveyance, his widow shall notwithstanding be entitled to dower in equity; for where an act is to be done by a trustee, that is looked on as done which ought to have been done. But this doctrine is not supported by the decree in the case referred to, without the additional proposition, that a widow was dowable of an equity of redemption in fee. It was a mortgage in fee, and not paid off during the coverture. If the trustee therefore had conveyed, he would have conveyed an equity of redemption only, subject to a mortgage in fee; and the widow would not have been entitled to dower, unless she was dowable out of such equity of redemption, which she was not. This therefore, though said, will not support the decree; and the proposition is too important, and contradicted by too many analogies, to be hazarded upon this *dictum* alone. (a)

22. It is said by Lord Cowper, that the widow of a *cestui que trust* of a copyhold ought to have her free bench, as well as if the husband had the legal estate in him. But this doctrine has been contradicted in the following case:—

(c) [But now by the statute 3 & 4 Will. 4. c. 105. s. 2. women married after the 1st of January, 1834, are dowable out of equitable estates. Sup. Tit. 6. ch. 1. s. 25. note]

23. A bill was brought by a widow for a customary estate. The husband's father bought the lands, which were conveyed to him and D. and the heirs of the father. The father devised the lands to the husband in tail; and D. survived the husband. The custom was laid for the wife to have the whole, as her free bench. Goodwin v. Winsmore, 2 Atk. 525.

Lord Hardwicke—"It is an established doctrine now, that a wife is not dowable of a trust estate. Indeed a distinction is taken by Sir J. Jekyll, in *Banks v. Sutton*, in respect to a trust, where it descends or comes to a husband from another, and is not created by himself: but I think there is no ground for such a distinction; for it is going on suppositions which will hold on both sides; and at the latter end of the report Sir J. J. seems to be very diffident of it, and rested chiefly on another point in equity; so that it is no authority in this case. But there is a late authority in direct contradiction to the distinction above taken in *Banks v. Sutton*; the case of the Attorney-General v. Scott. Forrest 138. The only case for the plaintiff is that of *Otway v. Hudson*, 2 Vern. 583. There it was free bench, and is so called here; but it appears plain to be only customary dower. Free bench is merely a widow's estate in such lands as the husband dies seised of; not that he is seised of during the coverture, as dower is. Tit. 10. c. 3. There were many circumstances in the case of *Otway v. Hudson*; it was decreed on the endeavour of the husband to get the legal estate surrendered, and the refusal of the trustees; and grounded on his will: but as to the general doctrine at the latter end, it is not warranted by the decree." The bill was dismissed. Forder v. Wade, 4 Bro. C.C. 521.

24. Where a man, immediately before his marriage, privately and secretly conveys his estate to a trustee for himself, in order to defeat his wife of dower, such conveyance will be deemed fraudulent and void. Tit. 32. c. 27.

25. Before the statute of Uses, the king was not entitled to a use upon an attainder for treason of the *cestui que use*, as is mentioned in the preamble to that statute: so that afterwards trusts were, by an analogy drawn from uses, also protected from forfeiture, upon an attainder of the *cestui que trust* for high treason. This produced the statute 33 Hen. 8. c. 20. by which it is enacted, "that if any person shall be attainted or convicted of high treason, the king shall have as much benefit and advantage by Forfeitable for treason. Tit. 11. c. 2. s. 24.

Vide supra,
Tit. 1. s. 76, 77.
54 Geo. 3. c. 145.

such attainder as well of uses, rights, entries, and conditions, as of possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of parliament."

1 P. C. 248.

26. Lord Hale has observed, that at the time when this statute was made, there could be no use but that which is now called a trust; and although it was determined in Abingdon's case, that a trust estate of freehold was not forfeited by attainder of treason, yet that resolution could not be reconciled with the statute 33 Hen. 8., as the uses there mentioned could be nothing but trusts; therefore he was of opinion, that upon an attainder for high treason of the *cestui que trust* of an inheritance, the equity or trust was forfeited; though possibly the land itself was not forfeited.

But not for felony.

Vid. sup. Tit. 1. ss. 76, 77.

27. Whatever may be the case in an attainder for high treason, it has been determined that an attainder for felony is not within the statute 33 Hen. 8. Therefore, in such a case, neither the trust nor the land becomes forfeited; for the king has his tenant as before, namely, the trustee.

Attorney-General v. Sands, 1 Hale, P. C. 249.

28. Freeman Sands being attainted of felony, for the murder of his brother, and having a trust estate in lands held of the king, of which Sir George Sands had the legal estate; the Attorney-General preferred an information in the Exchequer against Sir G. Sands, to have a conveyance of the legal estate to the king. The Court resolved, that although Freeman Sands had the trust of the land at the time of his attainder, yet inasmuch as Sir G. Sands continued seised of the lands, and so was tenant to the king, though subject to the trust, yet the trust was not forfeited to the crown; but that Sir G. Sands should hold the lands for his own benefit, discharged from the trust.

Not subject to escheat. *Burgess v. Wheate*, Tit. 30. *King v. Holland*, Allyn 14. Style 41. And see *Weaver v. Maule*, 2 Rus. & M. 97.

29. It was decreed by Lord Northington in a modern case, that a trust estate of inheritance does not escheat to the crown by the death of *cestui que trust* without heirs: but that the trustee shall hold the land discharged from the trust. Lord Mansfield held, that trust estates should escheat in the same manner as legal ones, and Lord Thurlow appears to have been of the same opinion.

Liable to crown debts. Tit. 1.

30. It appears somewhat doubtful, whether trusts were originally liable to crown debts. But by the statute 13 Eliz. c. 4. it is enacted, that if any person, who is an accountant, or indebted to the crown, shall purchase any lands in the name of

other persons, to his own use, all such lands shall be taken for the satisfaction of the debts due by such persons to the crown.

31. It was formerly held by the Court of Chancery, by analogy from the old law of uses, that trust estates were not subject to debts, nor assets in the hands of the debtor's heirs. To remedy this, it was enacted by the statute of Frauds, s. 10.—

“That it shall and may be lawful for every sheriff or other officer, to whom any writ or precept shall be directed, upon any judgment, statute, or recognizance, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, &c. as any other person or persons shall be seised or possessed in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done if the said party against whom the execution shall be so sued had been seised of such lands, tenements, &c. of such estate as they be seised of in trust for him at the time of the said execution sued, which lands, tenements, &c., by force and virtue of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued: and if any *cestui que trust* shall die leaving a trust in fee simple to descend to his heir, then and in every such case such trust shall be deemed and taken, and is hereby declared to be, assets by descent; and the heir shall be liable to and chargeable with the obligation of his ancestors, for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended.” (a)

And to all other debts.
Bennet v. Box,
1 Cha. Ca. 12.

29 Cha. 2. c. 3.

Harris v. Pugh,
4 Bing. 335.

32. It has been held, that if a trustee has conveyed away the lands, by the direction of the *cestui que trust*, before execution is sued out, they cannot afterwards be taken by the creditor.

Hunt v. Coles,
Tit. 14.

33. Where a trust estate descends on the heir at law, though it may be necessary to resort to equity to reduce it into possession, yet it will be considered as legal, and not equitable assets; a trust estate being made assets by the statute.

2 Atk. 293.

34. Trust estates are in all cases subject to merge in the legal estate, whenever both estates come to the same person, because

Merge in the legal estate.
Wade v. Paget,
1 Bro. C.C. 263.
Vide Goodright v. Wells, Tit. 29.
See Tit. 39.

(d) [An equity of redemption is not a trust within this statute and it has therefore been held to be equitable assets. Plunket v. Penzon, 2 Atk. 290.]

a man cannot be trustee for himself. And in a modern case Lord Thurlow said it was universally true, that where the estates unite, the equitable must merge in the legal.

3 Ves. jun. 126. 35. In a subsequent case Lord Alvanley said, "Another position was maintained in a latitude that would create infinite confusion. That where there is in the same person a legal and equitable interest, the former absorbs the latter. I admit that where he has the same interest in both, he ceases to have the equitable estate, and has the legal estate, upon which this court will not act, but leaves it to the rules of law. But it must be understood always with this restriction, that it holds only where the legal and equitable estates are co-extensive, and commensurate: but I do not by any means admit, that where he has the whole legal estate and a partial equitable estate, the latter sinks into the former; for it would be a disadvantage to him."

Where a legal estate is a bar in ejectment.

36. It is a rule of law that in an ejectment the plaintiff must recover upon the strength of his own title; and cannot found his claim on the weakness of that of the defendant; for possession has given the defendant a right against every man who cannot shew a good title. The party who would change the possession must first establish a legal title in himself: therefore where it can be shewn by the defendant that the legal title is not in the plaintiff, he cannot recover in the action.

3 Burr. 1901.
Cowp. 46.
Doug. 721.

37. It was formerly held that an outstanding legal estate should not be set up as a bar in ejectment to the *cestui que trust*, where he was entitled to the benefit of the whole legal estate. But Lord Mansfield has said, the rule only was, that the legal estate should not be set up, to defeat the *cestui que trust*, in a clear case; for where the trust was perfectly manifest, the rule stood upon strong and beneficial principles; because in ejectment the question was, who was entitled to the possession. But if a trust was doubtful, a court of law would not decide upon it in an ejectment; it must be put into another way of inquiry.

8 Term R. 122.

38. This doctrine has been denied by Lord Kenyon, who has said, that "if it appear in a special verdict, or a special case, that the legal estate is outstanding in another person, the party not clothed with that legal estate cannot recover in a court of law. And in this respect I cannot distinguish between the case of an ejectment brought by a trustee against the *cestui que trust*, and an ejectment brought by any other person."

39. In the case of *Lade v. Holford*, it appears to have been agreed that where the beneficial occupation of a trust estate by the person entitled to it has given reason to suppose that there was a conveyance of the legal estate to the person who was equitably entitled to it, a jury may be directed to presume such a conveyance. And this doctrine is confirmed by the following case :—

Where a reconveyance will be presumed,
3 Burr. 1901.
Doug. 721.

40. Upon a bill in Chancery for the specific performance of an agreement to purchase a farm, the defendant objected to the title. The estate appeared to have been conveyed in 1694 by way of indemnity ; and as to one moiety of the estate, there was no provision for reconveying it ; as to the other moiety there was such a provision after the death of two persons then living, and eleven years after. In a family settlement executed in 1694, the conveyance of 1664 was excepted. From that time no notice was taken of it ; but the estate was conveyed by the persons in possession, as if they were seised of the legal estate. So that the owners had acted as proprietors of the fee simple for a hundred and forty years ; and no claim appeared to have ever been made on the estate, under the deed of indemnity. The objection to the title was founded on the legal estate's being outstanding. To which it was answered, that a reconveyance of it ought to be presumed.

Hilary v. Waller, 12 Ves. 239.

Doe v. Lloyd,
Peake on Evid.
6 Ed. App. 41.

See also *Skin. 77*.
Lady Stafford v. Llewellyn, and
Keene v. Dear- don, 8 East, 266.
1 Turn. 29. per Lord Eldon.
Cooke v. Soltau, 2 Sim. & Stu. 154.
Tenny v. Jones, 10 Bing. 75.

Sir W. Grant said, that length of time did not, of itself, furnish the same sort of presumption, in this case, that it did in a case of adverse possession. Long continued possession implied title ; as, if there was a different right, the probability was, that it would have been asserted. But undisturbed enjoyment did not shew whether the title was equitable or legal. It did not follow however that a conveyance of the legal estate could not be the subject of presumption ; though the presumption was made upon a different ground. Lord Kenyon, though disinclined to permit ejectments to be maintained upon equitable titles, always admitted that it might be left to the jury to presume a conveyance of the legal estate. On what ground was such presumption to be made ? On this, that what ought to have been done should be presumed to have been done : when the purpose was answered for which the legal estate was conveyed, it ought to be reconveyed. Presumptions did not always proceed on a belief that the thing presumed had actually taken

Cowp. 215.

place. Grants were frequently presumed, as Lord Mansfield had said, merely for the purpose, and from a principle of quieting the possession. There was as much occasion for presuming conveyances of legal estates: as otherwise titles must for ever remain imperfect, and in many respects unavailable; when, from length of time, it became impossible to discover in whom the legal estate, if outstanding, was actually vested. If it could be ascertained at what period the legal estate ought to have been reconveyed, he saw no reason why the presumption of its being reconveyed at that period should not be made. The difficulty was, that by the deed of 1664 it was only as to a moiety of the estate, that any time was limited for the reconveyance. It could not however be meant that the legal estate in any part should continue outstanding for ever. The conveyance of it was made for a purpose that must have some limit. It was by way of security against the eviction of another estate. At what precise moment the danger of eviction ceased it was impossible to say: but if the time that had elapsed without claim, one hundred and forty years, did not furnish the inference that none could be made, he did not know what period would be sufficient for that purpose. Mere possibilities ought not to be regarded. The Court, as Lord Hardwicke said in the case of *Lyddall v. Weston*, “must govern itself by a moral certainty; for it is impossible, in the nature of things, there should be a mathematical certainty of a good title.” The evidence of actual reconveyance was slight, and inconclusive. But on the general grounds he had before stated, he conceived there was no court before which a question concerning this title could come, that would not under all the circumstances of the case presume, or direct a jury to presume, that the legal estate had been reconveyed. It was therefore such a title as a purchaser might safely take. And decreed accordingly.

2 Atk. 19.

Doe v. Reed,
5 Barn. & Ald.
232.
S. C. Mad. &
Geld. 7. &
Ib. 54. *Cooke v.*
Soltan, 2 Sim.
& Stu. 154.

Doe v. Swym-
mer, 1 Ld. Ken-
yon Rep. by
Hanmer, 385.
Doe v. Bright-
wen, 10 East,
583.

The decree was affirmed by Lord Erskine.

[41. But where, from the nature and object of the original conveyance of the legal estate to the trustees, there is no inconsistency between the equitable ownership and the fact of the legal estate being suffered to remain outstanding, there it seems the presumption will not be made.]

CHAP. III.

*Rules by which Trust Terms are governed.*SECT. 1. *Terms in Gross.*6. *Terms attendant on the Inheritance.*9. *How Terms become attendant.*22. *When a Term is in Gross.*27. *A Term attendant may become a term in Gross.*29. *Terms attendant are Part of the Inheritance.*31. *Are real Assets.*32. *Not forfeited for Felony.*33. *Trust Terms will protect Purchasers from mesne Incumbrances.*SECT. 39. *And also from Dower.*44. *Must be assigned to a Trustee for the Purchaser.*46. *A term will not protect the Heir from Dower.*49. *Nor the Assignees of a Bankrupt.*50. *Neither Jointure nor Curtesy barred by a Term.*52. *Where a Term is a Bar in Ejectment.*

SECTION I.

THE principles upon which terms for years are held not to be affected by the statute of Uses have been already explained; it will now therefore be only necessary to state the rules by which they are governed. Terms in gross.

Terms for years are either vested in trustees for the use of particular persons not entitled to the freehold and inheritance of the lands, or for particular purposes, in which cases they are called terms in gross; and the persons entitled to the beneficial interest have a right in equity to call on the trustees, or persons possessed of the legal estate in such terms, for the rents and profits, and also for an assignment of the terms.

2. The *cestui que trust* of a term in gross has the same power of alienating and devising it, as if he had the legal estate. It should however be observed, that the stat. 1 Rich. 3. does not extend to trust terms; and therefore an assignment of the trust of a term, by the *cestui que trust*, will not pass the legal estate in the term. Ante, c. 2. s. 6.

Tit. 8. c. 1.
Prec. in Cha.
418.
1 Inst. 351 a.
n. 1.

3. The right to a trust term in gross, vests in the executors or administrators of the *cestui que trust*; and where a married woman is *cestui que trust* of a term, her husband has the same rights as if she had the legal estate.

King v. Ballet,
2 Vern. 248.
Creditors of Sir
C. Cox.
3 P. Will. 341.
Tit. 15. c. 3.
s. 18.

4. It is said in Vernon's Reports, that the trust of a term is not assets at law, within the statute of Frauds, for that statute only extends to a trust of lands held in fee simple. But it is equitable assets, in the hands of the executor.

Tit. 38. c. 19.
Terms attendant
on the In-
heritance.

5. Terms of this kind are in general governed by the same rules as legal ones; except that trust terms in gross are capable of being settled in a manner not allowed in the limitation of legal terms; of which an account will be given hereafter.

6. When terms for years became fully established, and the interest of the termor was secured against the effect of fictitious recoveries, long terms were frequently created; and although the purposes for which such terms had been raised were fully satisfied, still the terms, not being surrendered, continued to exist, the legal interest remaining in the personal representatives of the persons to whom they were originally limited. But as the owners of the inheritance were entitled to the benefit of them, the Court of Chancery deemed them to be in fact united to the inheritance, from which they acquired the name of terms attendant on the inheritance; for otherwise the right to such terms would have gone to the executors or administrators of the persons entitled to the trusts of them, as part of their personal estate; and the freehold and inheritance of the lands would descend to the heir at law.

Willoughby v.
Willoughby,
1 Term R. 763.

7. Thus Lord Hardwicke has said—"The attendancy of terms for years upon the inheritance, is the creation of a court of equity; invented partly to protect real property, and partly to keep it in the right channel. In order to it, this court framed the distinction between such attendant terms, and terms in gross; notwithstanding that in the consideration of the common law they are both the same, and equally keep out the owner of the fee so long as they subsist. But as equity always considers who has the right in conscience to the land, and on that ground makes one man a trustee for another; and as the common law allows the possession of the tenant for years to be the possession of the owner of the freehold; this court said, where the tenant for years is but a trustee for the owner of the inheritance, he shall not

keep out his *cestui que trust*; nor *pari ratione*, obstruct him in doing any acts of ownership, or in making any assurances of his estate. Therefore, in equity, such a term for years shall yield, ply, and be moulded, according to the uses, estates, or charges which the owner of the inheritance declares or carves out of the fee. Thus the dominion of real property was kept entire,”

8. Mr. Fearn has also observed, that “ without such attendancy, property in the samelands, united in the same owner, would take different channels; the dominion of real estates, instead of being entire, become split and divided between the personal and real representatives; and indeed leave the real representatives very little but the mere name of property. For an inheritance expectant on a term of any considerable duration is of very little value. So necessary, therefore, is the attendancy of terms, under the circumstances above-mentioned, to keep real estates in a right channel, that the very existence of real property, as distinguished from the personal, seems in a great measure to depend upon it. For as there are few estates in which there are not such terms, if they are not to be considered as attendant, the whole substance and value of the estate would in them devolve to the executor, as personal property; whilst the heir or real representative would be left destitute of every thing but the shadow of the inheritance.”

Collect. Jur.
Vol. II. No. 6.

9. A term may become attendant on the inheritance, either by an express declaration of trust, or by implication of law. Thus where a satisfied term is assigned to a trustee, upon an express trust to attend the inheritance, the owner of such inheritance acquires a right to the term by the declaration of the parties. But there are many cases where no such declaration is made; and then it becomes a question, in equity, whether it is a term in gross, or a term attendant.

How terms become attendant.

10. In consequence of the maxim in equity that “ that should have the satisfaction, which has sustained the loss;” it has been often determined, that where a term is carved out of the inheritance for any particular purpose, when that purpose is satisfied, the term becomes attendant on the inheritance; for the inheritance sustains the loss by keeping the term on foot, and therefore should have it in satisfaction.

Francis Max.
in Eq. 21, 22.
Treat. of Eq.
B. 2. c. 4. s. 5.

11. A woman before marriage raised a term of 1000 years, upon trust that her intended husband should receive the profits

Best v.
Stampford,
1 P. Wms. 374.

during their joint lives ; if they should have any children, in trust for such children during the residue of the term. The husband died without children ; the wife survived, married another husband, who survived, and took out administration to her. The question was, whether the term should go to the husband, or attend the inheritance. Lord Cowper said, this was only an unskilful declaration, not the intent of the party : the particular purpose being served, it must attend the inheritance. If the term and inheritance had been in the same hands, it would have merged ; so here it should be attendant in equity.

Jones v. Morgan,
1 Bro. C. C. 218.
Wyndham v.
Earl Egremont,
Ambl. 753.
Countess of
Shrewsbury v.
Earl of S.
1 Ves. J. 233.
St. Paul v. Ld.
Dudley & Ward,
15 Ves. 173.

12. [The cases have established the following distinctions with respect to attendant terms created for the purpose of securing charges upon the inheritance.

When a tenant for life, or a tenant in tail after possibility of issue extinct, who, for the purposes of alienation is but a tenant for life, pays off the charge secured by the term, there *primâ facie* he will be considered a creditor on the estate, and in the absence of evidence of a contrary intention, the term will not be deemed attendant but in gross for his benefit to the extent of the incumbrance, and will accordingly devolve upon his personal representatives : he may, however, by express declaration, or other evidence of intention to exonerate the inheritance, render the term attendant thereon.

But the presumption is otherwise with respect to a tenant in tail, for as he represents the inheritance, *primâ facie*, it will be presumed, that he meant to discharge the estate, and unless there be evidence of a contrary intention, the term will attend.

Wigsell v. Wigsell, 2 Sim. & Stu. 364.

But where a tenant in tail in remainder expectant upon a previous life estate and failure of issue, pays off an old mortgage, and takes an assignment of the term ; the rule is otherwise, since the principle applicable to a tenant in possession paying off a charge, does not apply to one whose estate might be defeated by the birth of issue of another person. Where the owner of the whole inheritance becomes entitled to such a charge, there the charge will merge, and of course the term will become attendant if kept outstanding.

2 Bro. P. C. 1.

13. The case of *Huntingdon v. Huntingdon*, may be here distinguished as not in any degree militating against the preceding distinction, as regards a tenant for life.]

There Lord and Lady Huntingdon settled lands which were

the estate of Lady H., to the use of Lady H. for life, remainder to their eldest son in tail; with a power to Lord and Lady H. to revoke and limit new uses. Lord H. prevailed on Lady H. to exercise this power so far as to demise the premises for 1,000 years by way of mortgage, for raising 4,500*l.* for Lord H. who *covenanted to pay off the money*. Lord H. paid off the mortgage, took an assignment of the term to a trustee for himself, and devised it for the benefit of his younger children. Upon the death of Lord H. his eldest son, who took the inheritance, filed his bill against the personal representatives of his father, and the trustees of the term, praying that it might be assigned to attend the inheritance, free from incumbrances. Lord K. Wright decreed that the plaintiff must redeem the mortgage. But on an appeal to the House of Lords, the decree was reversed, and the term directed to be assigned to the appellant; because, when Lord H. paid off the mortgage, the purpose for which the term was created being satisfied, it became attendant on the inheritance.

Davidson v.
Foley, ante,
c. 1.

[In the preceding case Lord H. was not tenant for life, but at most seised *jure uxoris*: the mortgage was made for his exclusive accommodation; and Lady H. was no party to the assignment of the term to the trustee: and, as urged in the argument for the appellant, it was against equity that Lord H. should be considered a mortgagee or incumbrancer on the estate for having discharged his own debt.]

14. Where a person purchases the freehold and inheritance of lands in his own name, and obtains an assignment of an outstanding term to a trustee for himself; such term will be considered as attendant on the inheritance.

15. R. Tiffin purchased a freehold estate, took the conveyance in his own name, and an assignment of a mortgage term for years in the names of two trustees. Lord Nottingham held that this term was attendant on the inheritance.

Tiffin v. Tiffin,
1 Vern. 1.
Whitchurch v.
Whitchurch,
2 P. Wms. 236.
9 Mod. 124.

16. J. Hoole took an assignment of a term for years, which was in mortgage to one Shepherd, who was a trustee for him; and afterwards purchased the inheritance of the same premises in his own name. Lord C. J. Wilmot said, when Hoole purchased the fee, he became both the hand to receive, and the hand to pay off the mortgage money. It wrought an extinguishment of the debt due on the mortgage, and the term was gone; though not extinguished in point of law, because it was in Shepherd. Yet it be-

Goodright v.
Shales,
2 Wils. R. 329.

came attendant on the inheritance; and must follow it in point of law, as much as if it had been made to do so by the act of the party.

17. Where a person takes a conveyance of the freehold in the name of a trustee, and an assignment of the term in his own name, the consequence is the same.

— *v. Langton*,
2 Cha. Ca. 156.

18. A woman took a mortgage for 1,000 years in the name of her brother, afterwards purchased the inheritance in the name of another, and the term of years was assigned to her. The question was, whether this term belonged to the heir, or the personal representative. A difference was taken at the bar, namely, that if she had first purchased the fee, and afterwards the lease, it should wait on the inheritance: but here the lease was first in her.

Lord K. North said, there was no difference in reason; and decreed that the heir should have the lease, to attend the inheritance.

Dowse v. Percival, 1 Vern.
104.

19. A citizen and freeman of London, possessed of a lease of lands, bought the reversion and inheritance, and died. The question was, whether, as there was no declaration that this lease should attend the inheritance, it was part of the personal estate of the purchaser. Decreed that it was attendant upon the inheritance; and, upon a rehearing, the decree was affirmed by Lord K. North.

20. It may be collected from the preceding cases, that whenever a term would merge in the inheritance, if both were in the same person, it shall be considered as attendant on the inheritance. And in the following modern case it was resolved that where a person, having a term for years, contracted for the purchase of the inheritance, and died without having a conveyance of it, the term was attendant.

Capel v. Girdler,
9 Ves. 509.

21. A bill was filed by residuary devisees and legatees, praying that the will might be established, &c.; that the plaintiffs might be declared entitled to the benefit of a contract by the testator, to purchase an estate, and the contract completed. The testator had entered into the contract, after the execution of his will, for the purchase of the inheritance of the estate, being at that time lessee of the premises for a term of years; and died before any conveyance was made. The plaintiffs therefore, if the court should be of opinion that they were not entitled to the benefit of

the contract, claimed the residue of the term, as residuary legatees. The defendant, the heir at law, claimed the inheritance of the estate contracted for, praying that the purchase might be completed out of the personal estate; insisting that the testator became seised of the inheritance from the date of the contract, and that the term was attendant upon the inheritance.

Sir W. Grant, M.R.—“I take the case to be this: the testator had a lease in his own name, had contracted for the purchase of the inheritance, and died before the conveyance to him was completed. Having contracted for the purchase of the inheritance, he became complete owner of the whole estate. For it is clear in this court, a party, who has contracted for the purchase of an estate, is equitable owner; the vendor is a trustee for him. If he had, by his will, afterwards disposed of all his lands, this estate would have passed by that will. I thought it had been long established, that where the same person has the inheritance and the term in himself, though he has in one the equitable interest, and the legal estate in the other, the inheritance draws to itself the term, and makes it attendant. That appears from *Whitchurch v. Whitchurch*, *Goodright*, and *Shales*, and many other cases. Declare the heir at law entitled to the premises described in the term.”

22. The trust of a term for years may, however, belong to the person seised of, or entitled to the inheritance; and yet the term may not be attendant. For where a person indicates in any manner an intention of separating a term from the inheritance, it will be considered as a term in gross.

When a term is in gross.

23. A. being seised in fee, demised his estate to a trustee for 99 years, in trust for himself and his wife for their lives, and the life of the survivor, and afterwards in trust for the heirs of their bodies; in default of such issue, to the heirs of the body of the husband, remainder to the heirs of the survivor. They had issue a son: the husband died; after which the son died in the lifetime of his mother, who took out administration to her husband and son, and assigned the term.

Hayter v. Rodd,
1 P. Wins. 362.

After the death of the wife, it was contended by the heir of A. that all the trusts of this term either became void by accident, or were so in their creation: so that the term had no subsistence for the benefit of the personal representatives of any of the parties; but should be considered as attendant on the in-

heritance. It was, however decreed by Sir J. Jekyll, that this term should not be attendant on the inheritance; for that the party who raised it, and had power to sever it from the inheritance, shewed his intention to do so, by limiting the trust to the survivor of him and his wife, and the heirs of the survivor; which, though it was a void limitation, yet sufficed to shew his intent to sever such term from the reversion.

24. Where there is an intervening legal estate and beneficial interest between the term and the inheritance, the term will be considered to be in gross; because in that case it would not merge in the inheritance.

Scott v.
Fenhouillet,
1 Bro. C. C. 69.

25. Sir A. Chadwick purchased an estate in fee simple from Mrs. Rudger. There being an outstanding term in a trustee, a derivative lease of it was granted to a trustee for Sir A. C., with nominal reversion of eleven days to the trustee of Mrs. R. The question was, whether this term was in gross, or attendant.

Lord Thurlow said, every term standing out was, at law, a term in gross. If it was different in equity, it must be by affecting the person holding the term, with a trust, to attend the inheritance. This might be by two ways; by express declaration; and then, whether the term would, or would not merge, and whether the reversion were real, or only nominal, it must be attendant on the inheritance. Here it was not upon express declaration; then it must arise from implication of law, founded on the statute of Frauds, which forbids any trust, except by writing or implication of law. It was said to be extremely plain that Sir A. C. meant to consolidate the interests: this was begging the question. It was true he meant to take the largest interest he could: but it was by no means apparent that he meant to consolidate the interests. *He laid no stress on the days of reversion, for it was meant only as a nominal reversion: during that time the rent would be to the original lessor; but they did not mean to reserve a substantial interest.*

It would be necessary there should be an express trust to make this attendant on the inheritance. The transaction did not supply a necessary construction of law. It was a very nice and new point, whether the intent to purchase the whole interest was sufficient to make the term attendant upon the inheritance. *The impossibility he was under of purchasing the whole, rendered an express declaration necessary to make it attend the inheritance.*

26. Sir Edward Sugden has observed on this case, that at first sight it seemed impossible to reconcile those parts of the judgment which are printed in italics. But that it appeared from an opinion of Mr. Fearne's, in consequence of which the cause was reheard, that rents were reserved upon the leases granted by the trustees to Sir A. C., and the usual covenants were entered into by him; the trustees being restrained to that mode of making a title by their trust, which required a reservation of rent, and the usual covenants: this fact at once reconciled every part of the judgment. Lord Thurlow was of opinion, that the reversion itself was immaterial; but that the rents reserved by the leases rendered an express declaration necessary, to make the terms attend the inheritance. Mr. Fearne was also of opinion, that the terms would not be attendant, if there was any intervening estate, and beneficial interest, in any third person; to divide the ownership of the term from the inheritance. But as he was told that the rents reserved to the trustees upon the terms were afterwards purchased by Sir A. C., he thought the terms did attend the inheritance, although there was not an express declaration for that purpose; and he expressly delivered his opinion, subject to this fact, which he had learned from verbal information only. By Lord Thurlow's decree on the rehearing, it appears clearly that the rents were not purchased; and consequently that Mr. Fearne was misinformed.

Law of Vend.
6 ed. 442.
9 Ves. 510.
Collect. Jur.
Vol. II. 297.

27. In the case of Willoughby v. Willoughby, Lord Hardwicke says — "A term attendant on the inheritance may be disannexed, and turned into a term in gross, by the absolute owner of the inheritance; and so it is admitted by Serjeant Maynard in the Duke of Norfolk's case: or it may be made to become a term in gross, upon a contingency according to the resolution in that case."

A term attendant may become a term in gross.

3 Cha. Ca. 46.
Tit. 38. c. 19.

28. So it said by Lord Commissioner Raymond, that where a man has a term for years, which, by intendment of law only, attends the inheritance, certainly he has a power to sever such a term from the inheritance, if he should assign it to one man, and mortgage the inheritance to another; in such case the term would not attend the inheritance, but become a term in gross.

9 Mod. 127.

29. Terms attendant on the inheritance are considered as absolutely annexed to the inheritance, and are therefore not subject to those rules by which terms in gross are governed.

Terms attendant are part of the inheritance.
1 Vent. 194.

Collect. Jur.
Vol. I. 297.

They follow all alienations made of the inheritance, and also the descent to the heir; are capable of being entailed, and limited over after a general failure of issue; provided the inheritance is limited in the same manner. And where a common recovery was suffered of the inheritance, it would bar the entail and remainders over of the term, as well as those of the freehold; for the term can no longer attend an estate tail which is destroyed; nor can the trustee, who is but an instrument to protect others, have the term to his own use; so that it must thenceforth attend on the inheritance in fee.

1 Term R. 766.

Tit. 38. c. 5.

30. A term which is attendant on the inheritance is so fully considered as part of it, and conjoined to it, and not as a chattel real, that it does not pass by a will of chattels; but only by a will executed in such a manner as is required to pass freehold estates.

Are real assets.
Tit. 1.

Thurston v.
Attorney-
General,
1 Vern. 340.

Dowse v.
Percival,
1 Vern. 104.

31. Terms attendant on the inheritance are real assets in the hands of the heir, for the payment of all such debts as are chargeable on the inheritance; because such terms are annexed to the inheritance, which is real assets. And where the inheritance is in trustees, and a person has a term in his own right, which is attendant on the inheritance, and dies indebted, the term will be liable to his debts; for it is assets at law, and equity follows the law.

Not forfeited
for felony.
Ante, c. 2.

32. It was determined in the case of the Attorney General v. Sir G. Sands, that the trust of a term, attendant on the inheritance, was not forfeited by the attainder for felony of the *cestui que trust*; because it was no more than an accessory to the inheritance, which was not forfeited.

Trust terms
protect pur-
chasers from
mesne incum-
brances.

1 Ab. Eq. 333.
2 P. Wms. 491.
Shirley v. Fagg,
1 Cha. Ca. 68.
See 1 Vern. 52.
Jerrard v.
Saunders,
2 Ves. Jan. 464.

33. One of the great objects of the common law is to protect and secure honest purchasers from all prior claims and incumbrances. It is to this principle that fines and nonclaim, descents which take away entries, and collateral warranties, owe their origin and effect. The courts of equity, whose duty it is to follow the common law, soon adopted the same doctrine; and laid it down as a rule, that an honest purchaser, without notice of any defect in the title to the lands purchased, or of any incumbrance on them, at the time of his purchase, shall not have his title impeached in equity. Neither shall he be compelled to discover any writings or other things which may weaken it; nor will the Court of Chancery take from him any advantage by which he may defend himself at law.

34. In consequence of these principles, it has been long settled by the Court of Chancery, that where a person purchases an estate, without having notice, at the time of his purchase, of any incumbrance affecting it; if he afterwards finds out that there are incumbrances, and upon such discovery obtains an assignment of a prior outstanding term for years whether in gross or attendant, to a trustee himself; the Court of Chancery will not interfere to set aside such a term, though it be a satisfied one; so that the purchaser, having a good title at law, by means of the term, will be thereby secured from such mesne incumbrance. The reason is, that the circumstance of his purchasing without notice, gives him equal equity with the mesne incumbrancer; and by obtaining an assignment of a prior term, he acquires the legal estate; so that he comes within the maxim, that where equity is equal, the law must prevail. Besides, the mesne incumbrancer having only a title in equity, cannot prevail against one who has an equal title in equity, and also the legal estate; it being a maxim in chancery, that *in æquali jure melior est conditio possidentis*. Lord Nottingham has said, that precedents of this kind are very ancient and numerous, where the court has refused to give assistance against a purchaser, either in favour of the heir or the widow, the fatherless or creditors, or to one purchaser against another. (a)

Treat. of Eq.
B. 3. c. 3.
ss. 1, 2, 3.

Vide Wortley v.
Birkhead,
Tit. 15. c. 5.

Francis, 61.

Finch's R. 103.

35. In the case of Willoughby v. Willoughby, Lord Hard- 1 Term R. 763.

(a) Lord Hardwicke has thus explained this doctrine: "As to the equity of this court, that a third incumbrancer, having taken his security or mortgage without notice of the second incumbrance, and then, being *prius* taking in the first incumbrance, shall squeeze out, and have satisfaction before the second. That equity is certainly established in general, and was so in *Marsh v. Lee*, (Tit. 15. c. 5.) by a very solemn determination by Lord Hale, who gave it the term of the creditor's *tabula in naufragio*: that is the leading case. Perhaps it might be going a good way at first: but it has been followed ever since; and I believe was rightly settled, only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates. As courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; therefore, when there is a legal title, and equity of one side, this court never thought fit that by reason of a prior equity against a man who had a legal title, that man should be hurt; and this by reason of that force this court necessarily and rightly allows to the common law, and to legal titles. But if this had happened in any other country, it could never have been made a question. For if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore potior est in jure*, must hold." 2 Vesey, 573.

Ante.

wicke, after stating the origin and nature of trust terms for years, proceeds in these words:—"What kind of grantee or owner of the inheritance is entitled in this court to the protection of such a term? or, in other words, in whose hands such a term shall be allowed to protect the inheritance? In the first place, he must be a purchaser for a price paid, or for a valuable consideration; he must be a purchaser *bonæ fidei*, not affected with any fraud or collusion; he must be a purchaser without notice of the prior conveyance, or of the prior charge or incumbrance; for notice makes him come in fraudulently. If he has no notice, and happens to take a defective conveyance of the inheritance; defective either by reason of some prior conveyance, or of some prior charge or incumbrance; and if he also take an assignment of the term to a trustee for him; or to himself, where he takes the conveyance of the inheritance to his trustee; in both these cases, he shall have the benefit of the term to protect him. That is, he may make use of the legal estate of the term to defend his possession; or if he has lost the possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance. This made me say, that in those cases the court often disannexes the trust of the term from the legal fee; but still in support of right. For if a man come in fairly and *bonâ fide*, and has paid a price for the land, and acquired an estate in it, which the law will support (a plank by which at law he may save himself from sinking), there can be no ground in equity or conscience to take it from him. This is the meaning of what is generally expressed by saying, that where a man has both law and equity on his side, he shall not be hurt in a court of equity. It was once doubted whether, if the term were vested in a third person, a trustee generally, and not in the party himself, he should be allowed the benefit of it in equity; because the court ought to determine for whom the stranger was a trustee; and then the rule is, *qui prior est tempore potior est jure*. But this was settled by Lord Cowper, in the case of *Wilkes v. Boddington*. He lays it down to be a rule in equity, that where a man is a purchaser for a valuable consideration, without notice, he shall not be annoyed in equity; not only where he has a prior legal estate, but where he has a better right to call for the legal estate than his adversary."

3 Vern. 599.

36. Where a term for years is vested in a trustee, upon an ex-

press trust, a purchaser shall not protect himself by taking an assignment of such term, after notice of the trust.

37. Ann Bayley, being possessed of a term for years, made a voluntary settlement thereof, in trust for herself for life, remainder to her daughter Isabella for life, remainder to her children.—Isabella mortgaged the lands in question for 200*l.* to the plaintiff, who pretended he had no notice of the settlement: but hearing of it after, he got an assignment of the term from the trustees.

Saunders v. Dehew,
2 Vern. 271.

Per Cur.—Though a purchaser may buy in an incumbrance, or lay hold of any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust. For by taking a conveyance with notice of the trust, he himself becomes the trustee; and must not, to get a plank to save himself, be guilty of a breach of trust.

Vide Tit. 15.
c. 5.

38. An assignment of a term for years will not protect a purchaser from a crown debt; of which an account will be given hereafter.

Tit. 32. c. 27.

39. A term for years will protect a purchaser for a valuable consideration from the claim of dower, though such purchaser had notice of the marriage at the time of his purchase.

And also from dower.

40. Lady Radnor's husband was seised in tail of the lands in question. But there was a term of ninety-nine years prior to his estate, which was created for the performance of several trusts in the Earl of Warwick's will, all which were performed, and after, in trust to attend the inheritance. Lord Radnor having barred the entail, sold the estate to Vandebendy; and assigned the term to a trustee for him. After the death of Lord Radnor, his widow recovered dower, with a *cessat executio* during the term; and brought her bill in the Court of Chancery, to have the term removed, that she might have the benefit of her judgment at law. Lord C. Jeffries inclined to give relief; but Lord Somers held, that this being against a purchaser, equity ought not to give any relief; and dismissed the bill.

Radnor v. Vandebendy,
Show. Parl. Ca. 69.

On an appeal to the House of Lords, it was argued for Lady Radnor, that equity did entitle her to the third of this term. That a tenant by the curtesy would be entitled to it, and by the same reason a tenant in dower. That the term was to attend all the estates created by Lord Warwick's will, and in trust for such

persons as should claim under it ; which the appellant did, as well as the respondent. That the purchaser had notice of the incumbrance of dower, the vendor being married when he sold the estate ; and that Lady Radnor claimed under her husband, who had the benefit of the whole trust.

On the other side it was said, that dower was an interest or right at the common law only ; that no title could be maintained to dower, but where the common law gave it ; and if a term were in being, no woman was ever let in, until after the determination of that term. That this was the first pretence set up for dower in equity. The right was only to the thirds of the rent reserved on any term. That it had always been the opinion of conveyancers, that a term or statute prevented dower ; and that the consequence of an alteration would be much more dangerous than the continuance of the old rules. The decree was affirmed.

41. The doctrine established in this case is contrary to the general principles of equity, which has never extended its protection, in any other instance, to purchasers with notice of incumbrances, at the time of their purchase. The true and only reason on which it was founded was the silent uniform course of practice, uninterrupted, but at the same time unsupported, by legal decisions. An opinion having been generally adopted by the conveyancers, that a satisfied term would protect a purchaser from the claim of dower ; and many estates having been purchased under this opinion. It is now, however, fully recognized and confirmed by a decree of Lord Hardwicke, of whose judgment on the case the following report is taken from Mr. Butler's Notes on the first Institute.

Swannock v.
Lifford,
1 Inst. 208. a.
n. 1.
Hill v. Adams,
2 Atk. 208. S.C.

42. Lord Chancellor.—The plaintiff's husband being seised of a freehold estate, subject to a term of one thousand years, standing out in a mortgagee by virtue of a mortgage made by his father, conveys the inheritance to defendant for a valuable consideration ; and, at the time of this conveyance, defendant takes an assignment of the term in mortgage, in the name of trustees, to wait and attend upon such inheritance ; and now the plaintiff brings her bill against defendant the purchaser, for dower, praying to be admitted to redeem this mortgage term, and to have it out of the way ; and, upon payment of her proportion of the mortgage money, to be let into her dower imma-

diately, that she might not wait till the determination of the term. And the question is, whether the Court ought to decree this under the present circumstances of the case. I cannot say but that the decree already made at the Rolls for plaintiff the widow is absolutely consistent with the mere reason of the thing, if it was not to be considered originally, and settled : but as this must depend not only upon the precedents of the Court, but the practice of conveying titles to estates, upon which the precedents themselves were settled, I do not wonder that a decree of this kind should be made by a judge who was not absolutely conversant in such precedents of the Court, and the distinction taken therein. But upon consideration of them, and the great authority relied upon of Lady Radnor and Vandebendy, I am of opinion that the decree ought to be reversed ; and if it should not, would it not be going directly contrary to that great authority, and the reasons upon which it is founded, and make such uncertainty in this court, in regard to purchasers, that the subject would not know what to rely upon ? The wife here claims her dower, subject to a term originally standing out in a mortgagee ; the consequence of that is, that, in law, though she might have brought her writ of dower and recovered judgment, yet she could not have had the benefit of it, till after the determination of the term ; for the judgment would be with a *cessat executio* till that time : this was the wife's legal remedy ; and, that being so, she comes into this court upon the foundation of her general right of dower, to be delivered from that restriction which the law imposes upon her, from having the benefit of it till such determination of the term, and to be admitted to redeem this term, which is now not in the hands of the mortgagee, but of the purchaser, as being assigned to attend upon the inheritance, and for the other purposes before mentioned ; and though the assignment is not in the words, *to protect the inheritance from dower or mesne incumbrances*, yet it is always so understood, otherwise there would be no use in taking the term in the name of a trustee. It is admitted by the defendant, in case things had stood as they were at the time of the marriage, viz. that the term had been in the mortgagee, and the inheritance in the husband as heir, or purchased from him by the purchaser, without assignment of the term, as here, the wife, as entitled to dower, might then have come here to redeem the mortgage, to

have the benefit of coming at her dower immediately, by paying off the mortgage money, or keeping down the interest, for the benefit of the heir or purchaser; and even this was, (when originally settled,) going a good way in favour of a dowress, though it was consistent with the reason of the thing; for as she was entitled to dower, and as a mortgage is only a redeemable interest, it is fit the equity of redemption should follow the nature of the interest in the estate; and she to be endowed, and the heir at law to be entitled to the inheritance, subject to such dower, was giving the wife a real benefit, arising from her dower, and not a mere nominal one, as it would be at law, where there is an outstanding term: for, when the law says she shall have judgment for dower, but with a *cessat executio* till the determination of the term, that is, in fact, to say, she shall have no dower; and therefore this court, as against the heir, but not the purchaser of the term and inheritance, gives her the benefit of her dower, by removing the term; and if all the cases of tenancy in dower, and curtesy likewise, were now originally to be considered, it might as well be left upon the strength of the law, for it is undoubtedly a mere legal title that the one has as well as the other; and there is no contract of the parties intervening; therefore, if a woman marries, and the husband is in possession of an estate, or if a man marries, and the woman is in possession of an estate, each party knows that, at the time of the marriage, their estates are liable and subject, on the one side, to a tenancy by the curtesy, and, on the other, to dower, and to all mesne incumbrances and terms; and there is no harm to say that both shall take their chance. The commiseration in respect to dower has arisen from the determination in favour of tenancy by the curtesy; and, indeed, the distinction made between dower and curtesy is founded upon very slight reasons: but, however, it has been so established. The great point, in this case, depends upon the determination in the case of Lord Radnor and Vandebendy in Show. P. C., and Preced. in Chan.: and that was thus. (I mention it from Lord Somers' own notes.)

It was sent to the master in order to state the case, who stated it, that Charles Earl of Warwick, upon the marriage of his son, settled his estate, as to part, in jointure to his lady, and part upon the son in tail, and part upon himself in tail; and, upon failure of issue male, then to trustees for ninety-nine years, to be

disposed of by the said earl either by deed or will ; and for want of such appointment, the term was declared to be for the next in remainder, and to be attendant upon the inheritance. And as to a third part of a moiety of the estate, it was limited to Lord Bodmyn in tail ; the son died without issue, and then the earl, according to his power of appointment, charges the estate with some annuities, of which some were determined at the time of the purchase in question, and some were continuing ; and then the trust term, which was merely such, was to be attendant upon the inheritance. Vandebendy purchased of Lord Bodmyn, the plaintiff's husband, that part of the estate limited to him ; and took, not only a conveyance, but a recognizance in two statutes, in very considerable sums to indemnify the estate from incumbrances, and against the wife's dower, and for suffering a recovery, and took an assignment of the term. Vandebendy afterwards conveyed to Sir John Rotheram, which occasioned it to be called in *Preced. in Chan.* by that name. Lady Radnor brought a bill to have the benefit of dower against Vandebendy, (who purchased of Lord Bodmyn her husband,) and to set this term out of the way. And by the decree before made, Lord Jeffries inclined to give relief, and did set the term out of the way, and direct she should bring dower at law : but Lord Somers reversed that decree ; and upon appeal to the House of Lords, the reversal was affirmed. There was great doubt in this court, and so in the House of Lords ; and there was a great inclination in the house to reverse that decree of Lord Somers : but when the counsel came to the bar, the lords asked, whether it was usual for conveyancers to convey terms for years to attend the inheritance, to prevent dower, and the counsel with great candour saying it was, the lords affirmed Lord Somers' decree. The point that weighed in the judgment was, that this was the case of a purchase for valuable consideration ; that, in making conveyances, purchasers relied upon that method of taking a conveyance of the inheritance to themselves, and an assignment of the term standing out to a trustee, to attend it ; that the outstanding term was prior to the title of dower in the wife, and, therefore, purchasers have relied upon that as a bar to such dower : so that this Court and the House of Lords were of opinion, that if they were not to permit that to be so, it would be to overturn the general rule which had been established and

practised by many titles to estates, and tend to make such titles precarious for the future. And as to what was said in the case of *Brown and Gibbs*, *Preced. Chan.* 99. viz. that though there was a purchaser in the case of *Lord Radnor and Vandebendy*, yet that the court did not go upon that reason, I do not know who reported that to be the saying of the court: but this I know, that that was the only reason for the determination there; and that is plain, for *Vandebendy* the purchaser having purchased for a valuable consideration, *Lord Somers* did rely upon that greatly; for he said it had always been looked upon, that a term purchased in by such a person to protect the inheritance against dower, &c. has been sufficient for that purpose; and, therefore, it would not only be a new thing, to determine it should not, but of very great consequence, and greater than what appears at first view; besides, what has been already mentioned, and especially since practitioners have all along advised this method, whereby many persons have been purchasers in that way, and there cannot be a stronger argument against altering this method by any determination, than to say it was never done. But the argument by the counsel was of another nature; for they said that judgment has been given for dower in all ages; and in the case of a term, as in the present case, she might come into this court to have the benefit of her dower notwithstanding such term.

Ever since this case, it has always been said, that the Court is bound by it; and, on the other hand, I have heard it often said by the Court, that they will go no farther; and, therefore, to have the benefit of a determination, every person's case must be exactly and strictly the same with that. I am of the same opinion too, and will not go any further than that case does; so that then the question comes to this, whether there is any distinction between this case and that.

It is said that there the purchaser was allowed to protect himself by taking in the term attendant upon the inheritance, because that was a satisfied term; which, in the consideration of this Court, was become part of the fee. That he purchased the whole estate of the husband; and therefore an old term, such as that was, has been allowed to be so assigned to protect the inheritance: but that, in this case, the husband had nothing in the term, because he was owner of the inheritance, subject to it, and

to the equity of redemption of it; and for that, at the time of the purchase, the term was in mortgage, and standing out, and the money advanced still due upon it. That it was a security separate from the husband's inheritance, and the purchaser took it from the mortgagee only, and not from the husband. But I think that makes no difference here from that of Vandebendy: if there is any difference, it is against the plaintiff, and makes the case much stronger in favour of the present purchaser. It is difficult to say, upon the state of the case, that the term there was a satisfied term, at the time of the purchase. I rather think it was not, for Lord Somers states it that the Earl of Warwick, who had the power of appointing the trust term, did appoint it, by charging it with some annuities, which were to commence a year after: and that some of them were continuing, and some of them determined, and I think after the purchase made; and if that was so, this was not a satisfied term, but still subsisting, to pay those annuities which were incumbrances continuing on the terms; so that Vandebendy, who took the assignment of the term, took it subject to the trust so continuing on it, in like manner as the purchaser here took the term, subject to the mortgage, and the money due thereon: therefore the distinction endeavoured to be made between the case there, being a satisfied term, and this, being a mortgage term, not satisfied, fails. But supposing the term had been satisfied, how would that make any difference? It is true that would then have been a trust for the husband and his heirs; and he would have it as part of his ownership and dominion over the estate, and, consequently, it would be subject to dower, as against the husband; for if the husband dies, and there is a satisfied term continuing, the wife would be entitled to come into this Court against the heir, to set that term out of the way, in order to have the benefit of her dower; and that is expressly so said in the case of *Banks and Sutton*, 2 Wms. 700., by the Master of the Rolls, and he cites a case to that purpose; and undoubtedly she would without paying anything; and if, in the present case, the husband had made no conveyance to the purchaser, and the mortgage had continued in the mortgagee, or his assignee, and the equity of redemption had descended on the heir, she would have been entitled likewise to dower against him, by redeeming the term and paying her proportion of the mortgage money, or by keeping down the interest. But if a term

for years is in mortgage, and a person purchases the inheritance of the husband, and takes an assignment of the term from the mortgagee, by paying off the money, not only to have the trust of the term as a security, but to protect the inheritance so purchased—would it not be hard to take away the benefit of it from him? Shall it be said, that he shall have a less inheritance by taking in a mortgage term in that manner, by actually paying off the mortgage money, than if he had taken an old satisfied term for which he never paid any thing? Therefore if the term in *Lady Radnor's* case had been a satisfied one, that would have been so far from distinguishing that case from this, in favour of the plaintiff, that it would have been rather stronger in favour of the purchaser; for here he paid a consideration for the outstanding term, and there would have been nothing paid for such satisfied term. But it is said that this purchase of the mortgage was from the mortgagee, and not from the husband. If that was so, I do not know that this would make any difference, because the husband here joined in the assignment of the mortgage. But what results from this case is, that it was part of the agreement of all the parties (the husband joining), that the term should be purchased in by the purchaser of the estate, to attend his inheritance; and that is the very trust declared by the deed. It has been admitted here, that if the husband had paid off the mortgage himself, after the coverture, and taken an assignment of the term in mortgage, in trust for him and his heirs, to attend the inheritance (in which case it would have then become a satisfied term), and after this a purchaser had purchased from him, and paid him the whole money, and taken a conveyance of the inheritance from him, and an assignment of the term from the trustees, that would have been very well, and within the case directly of *Lady Radnor*. What is the difference, then, in the reason of the thing, whether the husband pays off the mortgage himself, and takes an assignment of the term, in trust for himself and his heirs, and then sells to a purchaser the inheritance, who takes the term from the trustees; or when the purchaser comes and purchases the inheritance from the husband, and pays off the mortgage, and takes an assignment of the term to himself; is the case the less strong for that? It is rather stronger. It is admitted that if this had been an old satisfied term, standing out attendant upon the inheritance, and a purchaser had purchased

from the husband, and had taken in this term, that would have protected the inheritance.

That if a man, before marriage, conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs in fee, that will prevent dower. So if a man purchases an estate after coverture, and takes a conveyance to trustees in trust for himself and his heirs, that will put an end to dower. So if he takes an estate in joint-tenancy, or a conveyance to himself for a long term of years : but it is objected that the act done here by the purchaser, at the time of purchase, he having notice of the marriage, will put his wife in a worse condition than she would have been in originally, if the purchaser had not intervened ; since then, there would have been a redeemable mortgage, (the equity of redemption being in the husband,) and the husband dying, she would be entitled to redeem such mortgage, and then to have had dower ; and, therefore, by the purchaser's knowing of the title of dower, by reason of the marriage, he would have put her into a worse condition, which in equity he ought not to have done ; and this ought not to alter her right. But this does not differ from the common case ; for in this case suppose the husband had, before the purchase, redeemed the mortgage, and taken an assignment of the mortgage term, in trust for himself and his heirs, to attend the inheritance, and after that the purchaser had purchased from him, and taken an assignment of such attendant term, in trust to him and his heirs,—would not that have altered the wife's right to dower ? though, without that intervention of the purchaser, she would be entitled to her dower, as against the heir. So, likewise, in the case of an old term attending upon the inheritance in trust. But this purchase prevents the descent of the estate to the heir ; and therefore it is not to be said that the purchaser has put the wife in a worse condition by the intervention of his purchase ; but because conveyancers did rely upon the assignment of the term to trustees, to protect the inheritance, as sufficient for that purpose, it was determined, as has been mentioned ; and I do not see how the present case can differ from that of an old term to attend the inheritance. But the present point is, that here the term was in the mortgagee, and the inheritance in the husband ; the term will stand in the way of dower at law, and the purchaser comes in upon that foot, pays his money, and relies

upon that term to protect his purchase; and therefore I think this is strictly within the reason of the case of *Lady Radnor and Vandebendy*, and all the other cases grounded upon it.

Another distinction made is, that here is an express covenant taken from the husband, against the dower of his wife; for the covenant is that the purchaser should enjoy the estate free from incumbrances, &c. and from all dowers, &c. and particularly the dower of the plaintiff; and then there is a covenant for further assurance, and that this shews that the purchaser relied upon this covenant as his security, to indemnify him against dower, and that it is plain, without question, this is notice of the dower.

A man may reasonably take a covenant against such right of dower, and yet rely upon the security of the trust term besides, and may take such covenant against any damages in respect to any suits by the wife for dower. The purchaser did not purchase here subject to the wife's dower, for he paid a price for the estate exclusive of it. If the estate in his hands had been subject to the dower, then the covenant against it of the husband's would not have signified: but, however, be that as it will, it is similar to that of *Vandebendy*, for there the purchaser took two statutes with defeazances, to indemnify the estate from incumbrances, and the wife's dower, and to suffer a recovery; and it was insisted upon there, by the counsel, as it is here. But Lord Somers said, though a man does take such security, which he does to prevent any damages that may arise, yet that does not preclude him from any favour he is entitled to.

Another consideration, in this case, is length of time, for the purchase was made in 1711; the husband died in 1719, and the plaintiff, the widow, never brought dower, or the present bill, till 1737; and it appears that defendant, the purchaser, has since made great improvements upon the estate; and therefore it would be very hard, especially after the several cases determined in favour of purchasers, even if there was a hair's breadth of distinction between this case and that of *Lady Radnor and Vandebendy*, to suffer the plaintiff now to come here for dower.

It is said, about ten years ago, plaintiff did claim her dower of the present defendant, which amounted to notice to him of such dower, (which he did not want:) but, however, the making a claim, and then not proceeding directly upon it, shews that plaintiff was conscious of her right, but would not proceed; and

the purchaser must think by her delaying so to do, that she would not, and that might be an inducement for him to make such improvements as he has done.

Therefore, upon the whole, I think the decree ought to be reversed, and the bill dismissed: but I will not give costs.

43. This doctrine has been fully recognized in a modern case by Sir R. P. Arden, M. R. who is reported to have said, — “ It is perfectly established, that a purchaser for a valuable consideration from the owner of the equitable interest, may protect himself, though the owner could not, by the assignment of any outstanding terms. He might therefore protect himself against any demand she (the widow) might have of dower at law. The decision is a very ancient one, and was affirmed by the House of Lords. Therefore, however questionable it might have been, it is now clear that a purchaser, or a mortgagee, who is a purchaser *pro tanto*, though he knows of the right of dower, may advance his money; and, taking in a term, may avail himself against any demand she might have of dower at law.”

Wynn v. Williams, 5 Ves. jun. 134.

44. A term standing out in a trustee to attend the inheritance will not however protect a purchaser from the claim of dower, unless it is actually assigned to a trustee for him.

Must be assigned to a trustee for the purchaser. Tit. 6. ch. 4. s. 17.

45. R. M. being seised in fee of certain lands, with an outstanding term vested in a trustee, upon an express trust to attend the inheritance, conveyed the estate to a purchaser for a valuable consideration; but no assignment of the term was made.

Maundrell v. Maundrell, 7 Ves. 567.

Upon the death of R. M. his widow claimed dower in Chancery; the purchaser contended that she was barred by the term.

Sir William Grant, sitting for the Lord Chancellor, declared his opinion to be, that without an assignment to a trustee for the purchaser, the term did not exclude the claim to dower. He observed, that at law all terms were considered as terms in gross; therefore every existing term, without regard to the purpose for which it was created, prevented a dowress from having any legal benefit from her recovery in dower, for she recovered with stay of execution during the term. But equity regarded the purpose for which the term was created and subsisted; and if it was only for the benefit of the owner of the inheritance, it was considered as a part of the inheritance;

not indeed absolutely merged, but so attendant upon, as to follow and accompany it, and every right and interest growing out of it, either by operation of law, or by voluntary agreement of the parties. Equity ought not therefore to permit such a term to be in any case used against the owner, either of the whole, or of a part of the inheritance ; for the uses adapted and accommodated themselves to all the interests which arose out of that inheritance ; with which, in contemplation of equity, the term for most purposes was considered as incorporated. Every description therefore of ownership should, in its order, design, and proportion, have a use in the term, commensurable with the interest existing in the inheritance. Therefore when dower arose, the term, in a proportion, was just as much attendant upon the interest growing out of the inheritance, as before it was attendant upon the inheritance during the husband's life. The heir therefore, though he could avail himself of the term at law, was not allowed in equity to defeat the widow's claim to dower ; for having a certain quantity of interest, equity must consider her as having a corresponding interest in the term. When the husband conveyed to a purchaser, and the wife did not by fine join, nothing passed but the estate the husband had, that is, an estate subject to the dower ; the right to dower remained just where it was ; the purchaser stood precisely in the place of the husband. The outstanding term would accompany the inheritance thus conveyed in the mode and manner in which it was attendant upon the same inheritance before it was conveyed. The term being a mere accessory, the operation of the conveyance was purely derivative and consequential. It was not possible that a greater interest could be incidentally acquired under the term, than directly in the freehold. That the whole doctrine upon this subject was discussed by Lord Hardwicke in *Willoughby v. Willoughby*, in which he noticed the opinion of some conveyancers, that where there was a term, of which the trust was already declared to attend the inheritance, it was not necessary to disturb it, and take an assignment to new trustees ; and shewed that not to be generally true. But if there were antecedent incumbrances, nothing but an assignment could protect against them ; and he conceived dower to be such an interest as could be guarded against only by an assignment.

Infra, s. 47.

Upon a rehearing before Lord Eldon, it appeared that neither deeds creating or assigning the term were delivered to the purchaser. He concurred in opinion with the Master of the Rolls.

[In the case of *Mole v. Smith*, stated in a former page, the Court of Chancery decreed the vendor's widow who claimed to be entitled to dower, and who happened to be the administratrix of the trustee of the term, to assign the term to a trustee for the purchaser to the exclusion of her dower.]

46. The doctrine that an outstanding term of years will protect a purchaser from the claim of dower was carried still farther: for it was determined that a satisfied term should protect an heir at law from dower. But this was soon after overruled; and it was resolved that an outstanding term should not protect an heir from dower.

A term will not protect the heir from dower.

Brown v. Gibbs, 2 P. Wms. 707.

47. A term was raised in Black Acre, in trust to indemnify a person against incumbrances that might affect White Acre, which he had purchased. The defendant Lady Williams brought a writ of dower of Black Acre against the plaintiff, who was an infant. His guardian had let her take judgment at law, without setting up the term, or taking any notice of it. So the bill was brought by the infant heir, to be relieved against the judgment.

Wray v. Williams, Prec. in Cha. 151.

It was said, by Lord K. Wright, that this case was the same with Lady Radnor's; and if she could not be relieved as plaintiff, it must be for want of equity; therefore, the plaintiff must be relieved against her, when she was defendant. And Lady Radnor's case having been affirmed in the House of Lords, the authority was so great that it could not be got over.

At a rehearing of this cause before Lord Harcourt, Lady Williams' counsel insisted that the heir, who was but a volunteer, should not in equity be relieved against the dowress; and that this case was different from that of Lady Radnor, in regard Vandebendy was a purchaser. To which it was answered, that if Lady Williams had been plaintiff in the original bill in equity, she could not have been relieved, as the term must have subsisted for the benefit of the heir at law. That this was the same in reason with Lady Radnor's case; that the term was prior to the marriage, and so the husband only seized of the reversion in fee during the coverture. That as to Vandebendy's being a purchaser, he was so with full notice of dower, and got in the term

1 P. Wms. 137.

10 Ves. 246.

1 Jac. & Wal. 665.

Tit. 6. ch. 4. sect. 17.

to protect himself against the dowress : and, therefore, having notice, was to be considered as a volunteer.

The decree was reversed ; and it was ordered that the plaintiff Lady Williams, having recovered dower at law, the trust term should not stand in her way in equity.

Ante, s. 42. 48. Lord Harcourt's doctrine has been fully assented to by Lord Hardwicke, who, in the case of *Swannock v. Lifford*, said, " If the husband dies, and there is a satisfied term continuing, the wife would be entitled to come into this Court, against the heir, to set that term out of the way, in order to have the benefit of her dower."

Nor the assignees of a bankrupt. *Squire v. Compton*, 9 Vis. Ab. 227.

49. In a case in Chancery, 10 Geo. 1., stated by Mr. Viner, the question was, whether the assignees of a bankrupt, by taking an assignment of a mortgage term, prior to the title of dower, should protect their estate from dower. It was insisted that the creditors and assignees stood only in the place of the bankrupt ; and since such an assignment to the bankrupt himself, or his heir, would not protect the estate from dower, in the hands of the heir, neither should it protect the estate in the hands of the creditors of the bankrupt, or the assignees. That this differed the case from that of *Radnor v. Vandebondy*, where it was held that such a prior term should protect the estate from dower, in the hands of a purchaser. It was decreed that the widow should be let into her dower.

Neither jointure nor curtesy barred by a term.

50. It has been stated, that the Court of Chancery will set aside a term for years in favour of a jointress. A tenant by the curtesy is also entitled to the aid of equity against a trust term, assigned to attend the inheritance, and set up against him by the heir.

Snell v. Clay, 2 Vern. 324.

51. The plaintiff, as tenant by the curtesy, brought his bill to be relieved against a term for years, that was assigned in trust to attend the inheritance, and had been set up by the heir at law in bar to his title. Decreed, that the term should not be made use of against him by the heir at law.

Where a term is a bar in ejectment.

52. In consequence of the doctrine stated in chap. ii. s. 35. if a defendant in ejectment can shew that there is an outstanding term for years, vested in a third person, to the possession of which the plaintiff is not entitled, he cannot recover. So where a defendant can shew that there is an outstanding term, of which the

trusts are not completely satisfied ; this will also operate as a bar to the plaintiff's recovery.

53. Lord Mansfield held, that though there was an unsatisfied outstanding term, yet if the plaintiff admitted the charge for which the term was created, and only claimed subject to such charge, the trustees of the term not asserting their right, he should recover. This doctrine was, however, rejected, by Lord Kenyon ; who held that a satisfied term might be presumed to have been surrendered : but that an unsatisfied term, raised for the purpose of securing an annuity, might be set up, during the life of the annuitant, as a bar to a plaintiff in ejectment, even though he claim subject to the charge.

Doe v. Pegge,
1 Term R. 768.
n.

Doe v. Staple,
2 Term R. 684.

54. In another case, Lord Kenyon directed a jury to presume, that an old satisfied term was surrendered ; saying, that he grounded himself upon the doctrine laid down by Lord Mansfield in the case of *Lade v. Holford* ; which was not, as had been supposed, that an ejectment might be maintained upon a mere equitable title, for that would remove ancient landmarks in the law, and create great confusion ; but that in all cases where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume, where such presumption might be reasonably made, that they had conveyed accordingly ; in order to prevent a just title from being defeated by a matter of form.

Doe v. Sybourn,
7 Term R. 2.

Bull. N. P. 110.

Ante, c. 2.

55. In a subsequent case, he said, that though, under certain circumstances, a jury might presume a satisfied term to have been surrendered ; yet if no such presumption was made, and it appeared in a special verdict in ejectment that such a term was still outstanding in a trustee, who was not joined in bringing the ejectment, the *cestui que trust* could not recover.

Goodtitle v. Jones, 7 Term R. 47.

56. Where an old mortgage term of 1,000 years, created in 1727, was recognized in a marriage settlement of the owner of the inheritance in 1751, by which a sum of money was appropriated to its discharge ; and no further notice of it was had till 1802 ; when a deed to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others, to secure a mortgage : Mr. Baron Thompson, at the trial, and the Court of K. B., upon a motion to set aside the verdict, held that it could

Doe v. Scott,
11 East. 478.

not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it.

Emery v. Grocock, 6 Madd. 54.
Ex parte Holman, 24 July, 1821, MS.
 Sugd. Vend. 428. Ed. 6.

57. A term was created in 1711 for raising portions. There was no evidence of the payment of the portions: but a settlement of the estate took place in 1744; and it contained a covenant that the estate was free from incumbrances. It did not appear that an assignment of the term had ever been made. On an objection to the title by a purchaser, Sir John Leach, Vice-Chancellor, held, that a surrender of the term must be presumed; and that, in matters of presumption, the Court will bind a purchaser, where it would give a clear direction to a jury in favour of the fact.

Doe v. Wrights, 2 Barn. & Ald. 710.
Doe v. Hilder, Id. 782.

58. Terms for years, though assigned to a trustee for the express purpose of attending the inheritance, have in two modern cases been presumed to be surrendered. And in the last of these cases, Lord C. J. Abbott said, "Where a term for years becomes attendant upon the reversion and inheritance, either by operation of law, or by special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor, and without supposing any surrender of the term; and, therefore, in general such enjoyment, though it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made; in such cases the things done or omitted may most reasonably be accounted for, by supposing a surrender of the term; and, therefore, a surrender may be presumed." (a)

Aspinall v. Kempson, Sugd. 427. also see *Doe v. Plowman*, *infra*.

(a) The doctrine of the Court of King's Bench has since been very much the subject of consideration; and has been questioned by Lord Eldon, and Richards L. C. B. See Sugd. on Vend. 6th edit. p. 420. *et seq.*—The Lord Chancellor observed, "It is not necessary to consider much the doctrine of presumption with reference to the present case: but the case of *Doe v. Hilder*, having been alluded to, and having paid considerable attention to it, I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and, for the safety of the titles to

59. [In *Bartlett v. Downes*, a lord of a manor, by deed granted the stewardship of the manor for the life of the grantee. Upon the death of the grantor it was attempted to set up a satisfied term to avoid the grant; and in order to support this grant, the Court of K. B. decided that it was properly left to the jury to presume the surrender. The term was created in 1712, assigned to attend in 1786, and in 1793 there was a general declaration as to all outstanding terms. 3 Bar. & Cress. 616.]

60. But in *Doe v. Cook*, the Court of C. B. refused to presume the surrender of a term in favour of a defendant who shewed no title to the premises sought to be recovered. The term was created in 1793, and in 1794 was assigned to secure the sum of 6000*l.*: under decrees in Chancery in 1801 and 1802, sales had taken place in other parts of the property for the purpose of paying off the mortgage debt; but the defendant (who, it happened, had a mere naked possession) did not produce any evidence of further proceedings in Chancery, nor of his own title to the premises. 6 Bing. 174.

61. In the preceding cases the presumption was made in favour of the party who had proved a right to the beneficial ownership, made to prevent justice being defeated by a mere formal objection: and the Court observed in *Doe v. Cook*, that no case could be put in which any presumption had been made, except where a title had been shewn by the party who called for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. In such case where the possession was shewn to have been consistent with the existence of the fact directed to be presumed, and in such cases only, had it ever been allowed. 6 Bing. 179.

62. The recent case of *Townsend v. Champernown* goes a step further: there the question arose upon an exception to the Master's report in favour of a title. A term of 1000 years was recited in a deed dated 1758 to have been created several years preceding, and to have been *assigned to attend*, but neither the deed creating nor that assigning the term were produced: it was urged for the report that the term should be presumed to be surrendered, on the authority of *Doe v. Hilder*; on the other hand the propriety of the decision in that case was questioned. 1 Yo. & Jerv. 538.

the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case."

Alexander, L. C. B. in overruling the objection observed, “until a different decision be pronounced I shall on the authority of *Doe v. Hilder*, after the expiration of 70 years, *without payment of interest*, presume the term to be surrendered.” One of the reasons of this judgment is unintelligible, and even admitting the propriety of the decision in *Doe v. Hilder*, it is not an authority for the introduction of the doctrine of presumption under the circumstances of the case of *Townsend v. Champenown*. In the former case, the presumption was made in favour of a creditor, who had seized the land under an *elegit*, taken out upon a judgment obtained against the owner of the inheritance; while in the latter case the presumption was called for by the vendor, merely to save himself the expence of getting in an out-standing estate, in compliance with the usual requisition of the purchaser.

2 Bar. & Adol.
573.

63. In the recent case of *Doe v. Plowman*, an unsuccessful attempt was made to carry the doctrine of presuming surrenders of terms still further; a period of 42 years only having elapsed since the term was assigned to attend. In that case a term of 1000 years was created in 1772 for securing a sum of 5000*l.*; the mortgage debt was paid off in 1787, and in 1789 the residue of the term was assigned to a trustee for a purchaser *to attend*. The purchaser continued in possession of the estate until her death. On her marriage the estate was settled, and, by virtue of a power in the settlement, she devised the estate; but neither the settlement nor the will noticed the term. One of the questions reserved was whether a surrender of the term was to be presumed. The cases of *Doe v. Wright* and *Doe v. Hilder* being cited as in point, Lord Tenterden, C. J. observed that the doctrine laid down in those cases had been much questioned; and upon enquiring whether it was usual to notice in marriage settlements such a term as the one in question, and being answered in the negative, his lordship observed, that there was no ground for the presumption, and the Court so decided.]

CHAP. IV.

*Estate and Duty of Trustees.*SECT. 1. *Estate of Trustees.*6. *Duty of Trustees.*11. *Their Acts not prejudicial to Trust.*12. *Exception—Conveyance without Notice.*17. *Where Purchasers are bound to see Trusts performed.*24. *Where they are not bound.*32. *Where the Receipts of the Trustees are sufficient.*39. *Trustees have equal Power.*41. *Can derive no Benefit from the Trust.*42. *Bound to reimburse the Cestui que trust.*45. *Have no Allowance for Trouble.*48. *But allowed all Costs and Expenses.*52. *Trustees seldom permitted to purchase the Trust Estate.*63. *Refusing to act, must release or disclaim.*64. *Discharged, and others appointed.*

SECTION I.

TRUST estates having been at first considered as similar to uses before the stat. 27 Hen. 8. trustees were consequently held to be in the same situation as the ancient feoffees to uses. But this was soon altered; and the Court of Chancery, in the exercise of their jurisdiction over trusts, has avoided the inconveniences that arose from leaving the legal estate in the feoffees to uses.

2. One of the principal of these was, that the estates of the feoffees to uses became subject to all their legal incumbrances. But upon the establishment of trusts it became settled, that trustees only held the legal estate for the benefit of the *cestui que trust*; and that the legal estate was not subject to any of the incumbrances of the trustees; to their specialty or judgment debts: to the dower of their widows, or the curtesy of their husbands.

3. Where a trustee is attainted of felony, the legal estate is forfeited: but the *cestui que trust* is entitled to relief in equity.

Estate of
trustees.

¹ P. Wms. 278.

² ——— 318.

Noel v. Jevon,

² Freem. 43.

Carter's R. 67. In the case of attainder for high treason it does not appear to have been settled whether the *cestui que trust* has any remedy against the crown. [But the better opinion seems to be that he has: the *cestui que trust* forfeits the estate for treason, and it would not be consonant with justice that the trustee should forfeit it for the same offence; and as Baron Atkyns argued in *Pawlet v. Attorney-general*, it would derogate from the king's honour, that what is equity against a common person should not be equity against him.

Hard. 465.
See also the
arguments in
Burgess v.
Wheate. Tit. 30.
Hard. 461.
Lane 39. 54.
Tit. 30.

4. Where a trustee dies without heirs by which the lands escheat, either to the crown, or to a subject, it seems to be doubtful, whether the lord by escheat holds the lands discharged of the trust or not; the authorities, however, appear to preponderate in support of the proposition that the lord holds the lands discharged.

See the preamble of the 12th sect.

5. But since the statute 39th and 40th Geo. 3. c. 88. § 12. it is not probable that the above question will arise with respect to forfeiture or escheat to the crown.

That statute enables the king by warrant under his sign manual to direct the execution of any trusts or purposes, to which any manors, &c. which shall escheat to the king, shall have been liable, at the time of such escheat, or would have been liable in the hands of a subject; and to make any grant of any such manors, &c., to any trustee or trustees or otherwise for the execution of such trusts, or to make any grant of any lands so escheated to any person or persons, either for the purpose of restoring the same to any of the family of the persons whose estates the same had been, or of rewarding any persons discovering such escheat as to the king shall seem fit.]

Duty of trustees.

6. With respect to the duty of trustees, it is still held, in conformity to the old law of uses, that pernaney of the profits, execution of estates, and defence of the land, are the three great properties of a trust. So that the Court of Chancery will compel trustees, 1. To permit the *cestui que trust* to receive the rents and profits of the land. 2. To execute such conveyances as the *cestui que trust* shall direct. 3. To defend the title of the land in any court of law or equity.

7. The necessity that the trustee should execute conveyances of the land arises from this circumstance; that as the legal estate is vested in him, and he is considered in the courts of

law, as the real owner, it follows, that although the *cestui que* *Ante, c. 2.*
trust can alone dispose of his equitable interest, yet he cannot
 convey the legal estate without the concurrence of the trustee.
 But where the *cestui que trust* has the absolute interest in the
 trust, he can compel the trustee to convey the legal estate,
 either to himself, or to any other person in fee simple.

8. The *cestui que trust* is only entitled to a conveyance where 2 P. Wms. 134.
 the whole of the trust belongs to him. For if lands are devised
 to trustees, in trust to pay annuities; and subject thereto, in
 trust for A. B.; the legal estate cannot be taken from the trustees
 while the annuities are subsisting.

9. Where there is a *cestui que trust* in tail, he may call on the 1 Ab. Eq. 384.
 trustee to convey the legal estate to him. And no one can after- 2 P. Wms. 134.
 wards prevent him from barring the entail; or the trustee may Boteler v. Al-
 join in the *cestui que trust* in barring the entail. But where the hington,
cestui que trust is only entitled to an estate tail, the trustee 1 Bro. C. C. 72.
 ought not to convey to him in fee simple.

10. Infant trustees are enabled, by the statute [1 Will. 4. c. 60. Tit. 32. c. 2.
 which repeals the 7 Ann. c. 19. and the subsequent acts] to
 convey lands whereof they are seised in trust, under the direc-
 tion of the Court of Chancery.

11. It is a rule in equity, that no act of a trustee shall pre- Their acts not
 judice the *cestui que trust*; nor will the forbearance of trustees, prejudicial to
 in not doing what it was their duty to have done, affect the the trust.
cestui que trust; since in that case it would be in the power of 2 P. Wms. 706.
 trustees, by delaying to do their duty, to affect the rights of 3 ——— 215.
 other persons. Wherefore the rule in all such cases is, that
 what ought to have been done shall be considered as done.
 And so powerful is this rule, as to alter the very nature of things;
 to make money land, and land money. Allen v. Sayer,
 Tit. 35. c. 14.

12. There is however one exception to this rule; for if a Exception—
 trustee be in the actual possession of the estate, which however conveyance
 is a case that seldom happens, and conveys it, for valuable without notice.
 consideration, to a purchaser, who has no notice of the trust, such
 purchaser will be entitled to hold the estate against the *cestui*
que trust; because confidence in the person is still deemed
 necessary to a trust; and it is a rule in equity, that an innocent
 person shall not, in general, have his title impeached. Millard's case,
 2 Freem. 43.

13. If a trustee mortgages the estate to a person who has no 1 P. Wms. 278.
 notice of the trust, the mortgagee will be allowed to hold against

the *cestui que trust*; because mortgagees are considered as purchasers, and as having a specific lien on the estate; whereas it has been observed that estates held in trust are not subject to the specialty or judgment debts of the trustee.

Bovey v. Smith,
Tit. 35. c. 14.

14. If a trustee sells to a stranger, who has no notice of the trust, and afterwards repurchases from the stranger for a valuable consideration, he will again become liable to the trust.

Mansell v.
Mansell,
Tit. 16. c. 7.
3 Atk. 238.
Pearce v. New-
lyn, 3 Madd.
186.

15. Where a purchaser has notice of the trust, though he pays a valuable consideration, he shall be subject to it. For, as Lord Hardwicke says, "If a person will purchase with notice of another's right, his giving a consideration will not avail him; for he throws away his money voluntarily, and of his own free will."

2 Salk. 680.
1 Vern. 149.

16. So if a trustee conveys an estate to a stranger, without any consideration; though the person to whom it is conveyed has no notice of the trust, yet he will be liable to it. (a)

Where pur-
chasers are
bound to see
trusts per-
formed.

17. We have seen that a purchase from a trustee, with notice of the trust, is a fraud, even though the purchaser should pay a valuable consideration. But where a trustee is authorized to sell, such a purchase cannot be fraudulent. There are, however, many cases in which a purchaser, with notice of the trust, is answerable for the trustee, and therefore bound to see that his money is applied in execution of the trust.

Dunch v. Kent,
1 Vern. 260.
Spalding v.
Shalmer, *Id.*
301.

18. Thus, where a person conveys or devises his estate to trustees, upon trust to sell it, for payment of certain debts specified in the deed or will, or in any schedule thereto annexed; a purchaser will in that case be bound to see that his money is applied in payment of those debts.

Lloyd v. Bald-
winn, 1 Ves. 173.

19. So where a decree was made for the sale or mortgage of an estate; with a direction that the money should be applied in payment of debts which were ascertained by the report of the Master; Lord Hardwicke held, that a purchaser under that decree, was bound to see to the application of his money.

20. Legacies stand upon the same ground as specified or scheduled debts; therefore a purchaser must see that his money is applied in payment of them.

21. It is the same where estates are conveyed or assigned to

(a) With respect to trustees appointed to preserve contingent remainders, their duty will be stated in Tit. XVI. *Remainder*.

trustees, upon trust to sell, and apply the money for any particular or specific purpose: a purchaser of the estate, with notice of the trust, is bound to see to the application of the money. For if the purposes to which it is directed are not fulfilled by the trustees, the estate will be still liable to them, in the hands of the purchaser.

22. Lands were vested in trustees by act of parliament, to raise a sum of money by mortgage to rebuild a printing-house. It was decreed that the mortgagee was bound to see the money applied accordingly. Cottrell v. Hampton,
2 Vern. 5.

23. It is a very common practice to direct the money arising from the sale of lands to be invested in the funds in the names of the trustees, upon several trusts; nor does it appear to have ever been judicially settled to what extent a purchaser is bound to see to the performance of such a trust. In a case of this kind, the late Mr. Booth says—"I am of opinion that all that will be incumbent on the purchaser to see done in this case, will be to see that the trustees do invest the purchase money in their own names in some of the public stocks or funds, or on government securities. And in such case, the purchaser will not be answerable for any non-application (after such investing of the money) of any monies which may arise by the dividends or interest, or by any disposition of such funds, stocks, or securities: it not being possible that the testator should expect, from any purchaser, any further degree of care or circumspection, than during the time that the transaction for the purchase was carrying on. And therefore the testator must be supposed to place his sole confidence in the trustees. And this is the settled practice in these cases. And I have often advised so much, and no more, to be done; and particularly in the case of the trustees under the Duchess of Marlborough's will." Mr. Wilbraham is said to have been of the same opinion. Cases & Opin
Vol. II. 114.

24. On the other hand, it has been long fully established, that where lands are vested in trustees, to be sold for payment of debts generally, without any specification of such debts, a purchaser is not bound to see to the application of his purchase-money. Where they are
not bound.
1 Vern. 261.
1 Bro.C.C. 186.
3 Bro. C. C. 96.

25. It is the same where lands are charged with the payment of debts generally. Lord Eldon has said, that a charge is a devise of the estate, in substance and effect, *pro tanto*, upon trust to Amb. 677.
6 Ves. 654. n.
7 — 323.

pay the debts. And in another case, he said, it had been long settled, that where a man by deed or will charges or orders an estate to be sold, for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application.

26. It has been stated that a purchaser is bound to see to the payment of legacies. But where a trust is created for the payment of debts and legacies, a purchaser is not bound to see that his money is applied in payment of the legacies.

Rogers v.
Skillicorne,
Amb. 188.

27. A person devised his real estates to trustees, upon trust to sell the same, and out of the money arising from such sale to pay his own and his father's debts and legacies. Lord Hardwicke said—"The subjecting the estate to the payment of legacies will not make the purchaser answerable for the disposition of the money; because the legacies cannot be paid without the debts: and they are not specified."

Jebb v. Abbot,
1 Bro. C.C. 186.
n. 2d ed.

28. In a modern case, Lord Thurlow said, that where debts and legacies are charged on lands, the purchaser will hold free from the claim of the legatees; for not being bound to see to the discharge of debts, he cannot be expected to see to the discharge of legacies; which cannot be paid till after the debts.

Culpeper v.
Aston, 2 Cha.
Ca. 115.
Vide Fearn's
Opin. 121.
contra.

29. Where a person devised his estates to his executors, to be sold for payment of debts, in case his personal estate should prove deficient; it was held that a purchaser was not bound to inquire whether there was a deficiency of the personal estate or not. For if the personal estate was sufficient, yet he should hold the lands purchased, against the heir; and the heir should have his remedy against the executor. But if there be a *lis pendens* between the heir and executor, to have an account; it is sufficient notice in law, without actual notice of the suit; so that a purchaser takes it at his peril.

1 Vern. 303.

30. It has been long settled, that where lands are conveyed to trustees, in trust to sell and pay debts, if more is sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser; for he is not obliged to enter into the account; and the trustees cannot sell just as much as is sufficient to pay the debts.

Lutwych v.
Winford,
2 Bro. C.C. 248.

31. In a case where lands were directed by will to be sold for payment of debts; and a decree made in Chancery, that the estate should be sold for that purpose; a purchaser under the

decree refused to complete his purchase, because more of the estate was sold than was necessary. Lord Thurlow said—"If the Master, in selling the whole, has consulted the convenience of the estate, he has acted right. The power given to the trustees was to sell the whole, or such part as might be expedient. The Court has decreed in the same way; and the Master, with the consent of the parties interested, has sold the whole. A purchaser cannot come in to object to it." The objection was overruled.

32. An opinion has long prevailed, that in all cases where lands are vested in a trustee to be sold, the trustee is competent to give a discharge for the purchase money. That the rule affecting a purchaser with misapplication of the trust-money only applies where there is no hand appointed to receive it; as in the case of a specific charge on the lands in the hands of the heir or devisee; there a purchaser, dealing with such heir or devisee, is bound to see that such charge is satisfied. This opinion is founded on the following authorities.

Where the receipt of the trustee is sufficient.

33. A person limited an estate to trustees, for payment of debts and legacies. The trustee raised the whole money, and the heir prayed to have the land. This was opposed, because the trustees had not applied the money, but converted it to their own use; so that the debts and legacies remained unpaid. It was determined by the House of Lords, that the heir should have the land discharged, and the legatees should take their remedy against the trustees. For the estate was debtor for the debts and legacies, but not for the faults of the trustees: therefore was only liable so long as the debts and legacies might be paid. Where the land had once borne its burthen, and the money was raised, it was discharged, and the trustees liable.

Anon.
1 Salk. 153.

34. A purchaser objected to the title to an estate which was vested in a trustee, in trust to sell, and to divide the money amongst the children of certain persons; on the ground that he would be liable to encounter the inconveniences of seeing to the application of his purchase-money. Lord Thurlow decreed a specific performance of the agreement, and refused to give the purchaser his costs.

Cuthbert v.
Baker, Trin.
1790.
Sugd. Vend.
378. 3d ed.

35. Lord Kenyon, when Master of the Rolls, inclined strongly to the opinion, that where trustees have power to sell, they must have the power incident to the character, namely, the

4 Ves. 99.

Balfour v.
Welland,
16 Ves. 151.
Sowansby v.
Lacy,
4 Mad. 142.

power to give a discharge for the purchase-money. And in a late case, where a purchaser objected to a title, on the ground that he was bound to see to the application of the money. Sir W. Grant overruled the objection upon another ground. But said—"I think the doctrine upon that point has been carried farther than any sound equitable principle will warrant. Where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice. But where the sale is made by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power; that is, to give a valid discharge for the purchase-money.

36. It is the usual practice to insert a clause in all deeds and wills, by which trustees are enabled to sell lands, declaring that their receipt shall be a sufficient discharge to the purchasers, who shall not be answerable or accountable for the misapplication or nonapplication of the purchase money. And it is fully settled that where a clause of this kind is inserted in a deed or will, by which trusts are created, the trustees may make a good title to a purchaser. But in a case of this kind all the trustees must join in the receipt.

Crewe v.
Dickens,
4 Ves. 27.

37. Mrs. Crewe conveyed an estate to the use of herself for life, remainder to three persons, their heirs and assigns, in trust to sell; with a proviso, that the receipts of those three persons be a sufficient discharge to the purchasers. One of the trustees died; another refusing to act, conveyed his interest to the remaining trustee, who sold the estate. The purchaser refused to take the title unless the trustee who had conveyed his interest, would join in the receipt for the purchase money, which he declined.

Lord Rosslyn said, he must allow the objection: if the trustee had renounced, he might dissent; for then the whole estate would have been in the remaining trustee. But according to the way they managed it, he had accepted the trust, and conveyed away the estate. That part of the trust that consisted in the application of the money he could not convey away. The purchaser taking the title with the knowledge of the trust, would be bound to see to the application of the money.

2 Swan. 365.
See also 3 Bar.
& Ald. 31.

38. [In Nicolson v. Wordsworth, Lord Eldon, C. decided that

where a trustee executes no other act than a conveyance to his co-trustees, the meaning and intent of that conveyance being a disclaimer, the release shall operate as such disclaimer; and the disclaiming trustee need not join in receipts for the purchase money. The above was the case of a will, declaring that the receipts in writing of the trustees or trustee, for the time being, should be discharges.]

39. Trustees have all equal power, interest, and authority; they cannot act separately, but must all join, both in conveyances and receipts. But although two trustees join in a receipt, where the money is in fact paid to one of them only, yet the trustee who actually received the money will in general only be accountable, [unless the concurrence of the others involves in it culpable negligence.]

Trustees have equal power, &c.
Fellows v. Mitchell, 1 P.Wms. 81. Treat of Eq. B. 2. c. 7. s. 5.

3 Sim. 265.

40. In all modern deeds by which trusts are created, a clause is inserted that each trustee shall be accountable for such sums only as shall actually come to his hands. And it has been determined in a modern case, that this does not bind the trustees as a covenant, but is a clause of indemnity; and the sense of it is this, that the trustees and their heirs shall not be accountable for more than the receiver.

Bartlett v. Hodgson,
1 Term. R. 42.

41. The Court of Chancery will not in any case permit a trustee to derive a benefit from the trust. Therefore if a trustee compounds a debt, or buys it for less than is due upon it, he shall not derive any advantage to himself from such a transaction. But where a trustee releases or compounds a debt, if it appear to have been done for the benefit of the trust, the trustee will be excused.

Can derive no benefit from the trust.
3 P. Wms. 251.
Forbes v. Ross,
1 Bro.C.C. 130.

42. Wherever trustees are guilty of a breach of trust, the Court of Chancery will compel them to reimburse the *cestui que trust* for any loss which he may have sustained. Thus, if a trustee sells the estate, he will be compelled in equity to make a full compensation to the *cestui que trust*. And if a trustee conceals any act done by a co-trustee, which amounts to a breach of trust, he will thereby make himself equally liable.

Bound to reimburse the Cestui que Trust.
Smith v. French,
2 Atk. 243.

Boardman v. Mossman,
1 Bro. C. C. 68.

43. Lord Hobart is said to have been of opinion, that an action at law might be maintained against a trustee for breach of trust. This is not consistent with Lord Hardwicke's definition of a trust; namely, that it is such a confidence between parties, that no action at law will lie; but is merely a case for the con-

1 Ab. Eq. 384.

2 Atk. 612.

Forrest, 109.
2 Atk. 19.
Perry v. Phelps, ante, c. 1.

sideration of a court of equity. It is, however, observable, that even in equity the *cestui que trust* is considered only as a simple contract creditor, in respect of such breach of trust; unless the trustee has acknowledged the debt to the trust estate, under his hand and seal.

Montfort v.
Cadogan,
17 Ves. 485.

44. It is usual to insert in all deeds by which trusts are created, a clause that the trustees shall not be answerable for any misfortune, loss, or damage, which may happen in the execution of the trusts, unless they arise from their own wilful default. But courts of equity charge trustees, and also their representatives, with the consequences of a breach of trust, whether they derive a benefit from the trust or not.

Have no allowance for trouble.
Treat. of Eq.
B. 2. c. 7. s. 3.

45. It is an established rule that a trustee shall have no allowance for his care and trouble in the execution of the trust; for on pretences of this kind the trust estate might be impoverished. Besides, the great difficulty there might be in adjusting the *quantum* of such allowance, as one man's time may be more valuable than another's; nor can there be any hardship in this, because every person who is appointed a trustee may choose whether he will accept the trust or not.

Ellison v. Airey,
1 Ves. 112.

46. But in a case where there was a direction in a will that the trustees should be paid for their trouble as well as expense, and it being objected that this might be of general prejudice, Lord Hardwicke said, this was a legacy to the trustees, to whom the testator might give satisfaction if he pleased. In Serjeant Hall's will, Sir Richard Hopkins's, and the Duchess of Marlborough's, there was a great allowance made to the trustees for their trouble, and no inconvenience; because it could carry it no farther than where there were particular directions. The Master was, therefore, directed to inquire what the trustees might reasonably deserve for their trouble.

2 Atk 58.

47. [In *Ayliffe v. Murray*, two persons executors and trustees under a will, refused to prove or suffer the *cestuis que trust* to take out administration with the will annexed, until he had executed a deed by which he bound himself to pay 100*l.* to one, and 200*l.* to the other trustee, within six months after they should have exhibited an inventory. Lord Hardwicke decreed that the deed was unduly obtained, and that no allowance should be made to the trustees and executors; observing that the Court would be extremely cautious and wary in establishing

any such agreements for extraordinary allowances beyond the terms of the trust.]

48. A trustee will, however, be allowed all costs and expenses which he has been put to in the execution of his trust, unless he has been guilty of improper conduct.

But allowed all costs and expenses.
Treat. of Eq.
Id.

49. Thus if a trustee sues in Chancery for the trust estate, and obtains a decree, with costs; and afterwards the *cestui que trust* exhibits a bill against him for an account of the trust estate; the trustee will be allowed in his disbursements his full costs, and will not be concluded by the costs that were taxed. (a)

Amand v. Bradburn,
2 Cha. Ca. 128.
Trott v. Dawson, 1 P. Wms. 780.
7 Bro. P. C. 26.

50. It is said by Lord King to be a rule, that the *cestui que trust* ought to save the trustees harmless, as to all damages relating to the trust: therefore, where a trustee has honestly and fairly, without any probability of being a gainer, laid out money, by which the *cestui que trust* is benefited, he ought to be repaid.

2 P. Wms. 455.

51. In all modern deeds whereby trusts are created there is a clause authorising the trustees to reimburse themselves all costs and expenses which they shall be put to in the execution of their trust.

52. It was formerly held that a trustee should not purchase any part of the trust estate for himself, on account of the dangerous consequences that might ensue from such a practice.

Trustees seldom permitted to purchase the trust estate.

53. Thus it was declared by Lord Hardwicke that the Court of Chancery will not suffer a trustee to purchase the estate of the *cestui que trust*, during his minority; though the transaction were fair and honest, and as high, or a higher price given than any other person would give. This the Court had always discountenanced, upon account of the general inconvenience that might happen from bargains of this kind. But where there was a decree for sale of a trust estate, and an open bidding before the Master, there the Court had permitted the trustee to purchase; for that was an open auction of the estate. At the same time, he said, the rule of the Court against trustees purchasing did not extend to trusts for persons of full age.

Davison v. Gardner,
MSS. R. 1743.

54. In another case, where on a devise to sell for payment of debts the trustee himself purchased part; Lord Hardwicke said, he would not allow it to stand good, although another person,

Whelpdale v. Cookson,
1 Ves. 9.

(a) [A trustee is however liable to costs when incurred through his unreasonable and improper conduct, 1 Russ. & M. 70. Id. 634.]

being the best bidder, bought it for him at a public sale; for he knew the dangerous consequence. Nor was it enough for the trustee to say, you cannot prove any fraud, as it was in his own power to conceal it. But if the majority of the creditors agreed to allow it, he should not be afraid of making the precedent.

Vide 6 Ves.
628.

Killick v.
Flexney,
4 Bro. C.C. 161.

55. A trustee, who had acted improperly in other respects, bought a lease, which was part of the trust property, at an appraisement; and afterwards renewed it in his own name. Decreed, that he should be a trustee only, and account for what he purchased.

56. In a subsequent case, it was said there was no general rule that a trustee to sell should not himself be the purchaser; but that he should not thereby acquire a profit.

Whichcote v.
Lawrence,
3 Ves. jun. 740.

57. An estate was conveyed to six persons, in trust to sell for the benefit of creditors. The estate was put up to auction, and purchased by one of the trustees, who afterwards sold it at a profit. Upon a bill filed by some of the creditors, praying that this purchase by the trustee might be for the benefit of the creditors; Lord Rosslyn said, it was a plain point of equity, and a principle of clear reasoning, that he who undertakes to act for another in any matter, shall not in the same matter act for himself. Therefore a trustee to sell shall not gain any advantage by being himself the person to buy. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain no profit. The consequence is beyond doubt, that in whatever shape that profit redounds to him, whether by management, which is the common way, or by superior good fortune, it is not fit that benefit should remain in him. It ought to be communicated to those whose interests being put under his care, afforded him the means of gaining that advantage. The trustee was decreed to account for the profits, with costs.

8 Ves. 345.

58. In another case it was resolved, that where a trustee purchases the trust estate, however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in reasonable time, to have a resale.

Campbell v.
Walker,
5 Ves. 678.

59. A person devised his estate to two trustees, upon trust to sell. One of the trustees purchased part of the estate at auction. A bill was filed by the residuary legatees, praying that the sale might be set aside, and the premises resold. It ap-

peared, upon the evidence, that the sale was perfectly fair and open.

Sir R. P. Arden, M. R. said, he would lay it down as a rule, that any trustee purchasing the trust property was liable to have the purchase set aside, if in any reasonable time the *cestui que trust* chose to say he was not satisfied. The trustee purchased, subject to that equity. And referred it to a master to inquire, whether it was for the benefit of the plaintiffs that the premises should be resold. If the master should be of opinion that it would be for their benefit, then it was declared that they should be resold. 6 Ves. 625.

60. In another case, however, Lord Eldon allowed of a purchase, under a trust for payment of debts, by the trustee, as agent for his father, both creditors in partnership, chiefly because the *cestui que trust* had full information, and the sole management of the sale; making surveys, settling the particulars, fixing the prices, &c. His Lordship said, that a *cestui que trust* may deal with his trustee, so that the trustee may become the purchaser of the estate. But though permitted, it was a transaction of great delicacy, and which the Court would watch with the utmost diligence; so much, that it was very hazardous for a trustee to engage in such a transaction. A trustee might buy from the *cestui que trust*, provided there was a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee should buy; and there was no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee.

Coles v. Trecothick,
9 Ves. 234.

Chambers v. Waters, 3 Sim. 42.

61. In a subsequent case Lord Erskine confirmed a purchase made by a trustee from the *cestui que trust*, under particular circumstances, with the confirmation and acquiescence of the *cestui que trust*.

Morse v. Royal,
12 Ves. 356.

62. The case of *Campbell v. Walker* came before Lord Eldon, on an appeal from the Rolls, who affirmed the decree with costs; but said—"The principle has often been laid down, that a trustee for sale may be the purchaser in this sense; that he may contract with his *cestui que trust*; that with reference to the contract of purchase, they shall no longer stand in the relative situation of trustee and *cestui que trust*. And the trustee having, through the medium of that sort of bargain, evi-

Ante, s. 59.
13 Ves. 601.

dently, distinctly, and honestly proved, that he had removed himself from the character of trustee, his purchase may be sustained." (b)

Refusing to act
must release or
disclaim.

Tit. 32. c. 27.

Crewe v.

Dicken.

Nielson v.

Wordsworth.

2 Swan. 365.

3 Bar. & Ald.

31. ante, ss. 37,

38.

Discharged, and

others ap-

pointed.

Ante, c. 1.

See 1 Will. 4.

c. 60. s. 21.

63. Where a trustee refuses to accept a trust, the usual practice is to require him to release all his estate and interest to the other trustees; or to execute a deed of disclaimer. Where he releases he has been considered as having, in the first instance, accepted the trust; and, therefore, as to that part of such trust as consisted of personal confidence, he could not transfer it to the other trustees.

64. It has been stated that the Court of Chancery will not suffer a trust to fail for want of a proper trustee: therefore, if a trustee refuses to accept of a trust, that Court will interpose; and either appoint a new trustee, or take upon itself the execution of the trust.

65. A person devised all his lands to two trustees, upon trust to sell and pay his debts. One of the trustees desired to relinquish the trust, and the other was willing to accept it. The Court of Chancery directed that the trustee, who desired to relinquish, should release to the other.

66. In a subsequent case the Court of Chancery removed a trustee, though he was willing to act, his co-trustees having refused to join with him in the execution of the trust.

67. In a late case a decree was made that a woman who was a trustee, but who had married a foreigner, should be discharged from the trust, though she denied any intention of quitting the kingdom, and desired to continue in the trust. The Court said there was great inconvenience in a married woman's being a trustee.

68. In all modern deeds of trust there is a proviso, that in case of any of the trustees dying, or being desirous of relinquishing the trust, or becoming incapable of acting; a new trustee shall be appointed, either by the *cestui que trust*, or the other trustees; and that the property shall be conveyed to such new trustees, jointly with the remaining trustees. (c) Where this

(b) [In *Lees v. Nuttall*, 1 Russ. & M. 53. it was decided that if an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal.]

(c) [Where a trustee of personal property, upon his retiring from the trust, transfer the trust funds to another trustee not duly appointed according to the power, he continues answerable to the *cestui que trust*. *Wilkinson v. Parry*, 4 Russ. 272.]

Travel v.

Danvers.

Finch, 380.

Uvedale v.

Ettrick,

2 Cha. Ca. 20.

Lake v. De-

lambert,

4 Ves. 592.

clause is omitted, the Court of Chancery will appoint a new trustee.

69. By a private act of parliament, estates were vested in three trustees, upon trust to sell, &c. Mr. Scott, one of the trustees, being appointed attorney-general of Upper Canada, executed a release. A bill was filed against the two remaining trustees, praying a reference to the Master to appoint a new trustee. It was said to be a common case; and the Court referred it to a Master to appoint a new trustee.

*Buchanan v.
Hamilton,
5 Ves. 722.*

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